

No. 75-679

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**In the Supreme Court of the United States**

OCTOBER TERM, 1975

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INTERNAL REVENUE SERVICE, PETITIONER

v.

FRUEHAUF CORPORATION, ET AL.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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*v.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

\_\_\_\_\_  
The Solicitor General, on behalf of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

**OPINIONS BELOW**

The memorandum opinion of the district court (Appendix A, *infra*, pp. 1A-6A) is reported at 369 F. Supp. 108. The subsequent injunctive order of the district court is set forth in Appendix A, *infra*, pp. 7A-12A. The opinion of the court of appeals (Appendix B, *infra*, pp. 13A-27A) is not yet officially reported.

**JURISDICTION**

The judgment of the court of appeals was entered on June 9, 1975 (Appendix C, *infra*, p. 28A). A

timely petition for rehearing was denied on August 8, 1975 (Appendix D, *infra*, p. 29A).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

Exemption 3 of the Freedom of Information Act bars disclosure of "matters that are \* \* \* specifically exempted from disclosure by statute." The question presented is whether this exemption covers Internal Revenue Service technical advice memoranda, letter rulings, and other related files because of the prohibition against public inspection of tax returns provided by 26 U.S.C. 6103, where such documents contain information which is either part of or related to returns filed by particular taxpayers.

#### STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Freedom of Information Act, 5 U.S.C. 552; Section 6103 of the Internal Revenue Code of 1954 (26 U.S.C.); and Treasury Regulations on Procedure and Administration, Section 301.6103(a)-1, are set forth in Appendix E, *infra*, pp. 30A-32A.

#### STATEMENT

Respondents are defendants in a criminal prosecution in the United States District Court for the Eastern District of Michigan. They are charged with: (1) conspiring to defeat the assessment of the federal manufacturer's excise tax imposed by Section

4061 of the Internal Revenue Code of 1954 (26 U.S.C.); (2) attempting to evade excise taxes of \$12,344,587, in violation of 26 U.S.C. 7201; and (3) aiding in the preparation of materially false and fraudulent excise tax returns, in violation of 26 U.S.C. 7206(2). During pretrial discovery proceedings, respondents sought to obtain from the government documents (in the possession of the Internal Revenue Service) which they claimed would supply information essential to their defense. The government contended that such materials were not subject to discovery<sup>1</sup> (Appendix A, *infra*, pp. 1A-2A).

Respondents thereupon brought this suit under the Freedom of Information Act (FOI Act), 5 U.S.C. 552, seeking copies of documents prepared by the Internal Revenue Service from January 1, 1947 to September 13, 1973, in connection with its determinations whether particular vehicles were subject to the manufacturer's excise tax, and its computation of the sales price of such vehicles under Section 4216 of the Code. Specifically, respondents seek technical advice memoranda, unpublished letter rulings, related correspondence and index systems, and Internal Revenue Service files relating to the issuance of 23 different published revenue rulings (Appendix A, *infra*, pp. 2A-3A).

The Internal Revenue Service moved for summary judgment on the ground that the requested documents

<sup>1</sup> After a nonjury trial, respondents were found guilty in July, 1975, and are awaiting sentencing.



were exempt from disclosure under exemption 3 of the FOI Act, 5 U.S.C. 552(b)(3), as "matters that are \* \* \* specifically exempted from disclosure by statute." In support of this motion, the Service relied upon Section 6103 of the Internal Revenue Code of 1954, which provides that tax returns shall be open to public examination only to the extent authorized in rules and regulations promulgated by the President (R. 29).<sup>2</sup>

The district court rejected the claim that the materials were specifically exempt from disclosure by statute. In its view, Section 6103 of the Internal Revenue Code was inapplicable to the documents at issue relating to excise tax returns because "[it] provides for the protection of the privacy of persons filing *Income Tax Returns*" (Appendix A, *infra*, pp. 5A-6A; emphasis in original). The district court thereafter entered an order denying the Internal Revenue Service's motion for summary judgment and enjoining it from withholding the records requested by respondents (Appendix A, *infra*, pp. 7A-12A). The court ordered that the Service make available the records and documents "intact and without deletion, except for those items which \* \* \* [it] submits to the Court \* \* \* sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the Court \* \* \* as to whether the proposed deletions are justified under the Freedom of Information Act \* \* \*" (Appendix A, *infra*, p. 8A).

<sup>2</sup> "R." refers to the record appendix filed in the court of appeals.

The court of appeals affirmed (Appendix B, *infra*, pp. 13A-28A). Although it concluded that the district court erred in construing Section 6103 to bar public inspection of only income tax returns, it held that disclosure of the letter rulings was appropriate because they were not "returns" within the meaning of Section 6103 and therefore did not come within exemption 3 of the FOI Act. While the court acknowledged that certain letter rulings might fall within the definition of "return" under the Presidential regulations promulgated under Section 6103, it concluded, in conformity with *Tax Analysts & Advocates v. Internal Revenue Service*, 505 F. 2d 350 (C.A.D.C.), that those Regulations could not "'immunize letter rulings from disclosure under the Freedom of Information Act', beyond that which Congress intended to protect under § 6103. 505 F. 2d at 354, n. 1" (Appendix B, *infra*, p. 20A).

In deciding that the technical advice memoranda sought by respondents did not come within exemption 3, the court of appeals declined to follow the contrary conclusion reached in *Tax Analysts & Advocates, supra*, 505 F. 2d at 355. It considered the scope of the district court's disclosure order with respect to such documents to be more limited than the order in the *Tax Analysts* case. Finally, the court of appeals also observed that the retained power of the district court to make *in camera* deletions from the technical advice memoranda would be sufficient to satisfy the prohibitions against disclosure of Section 6103 (Appendix B, *infra*, pp. 20A-22A).

## REASONS FOR GRANTING THE WRIT

1. In holding that technical advice memoranda and letter rulings<sup>3</sup> were not covered by exemption 3 of the FOI Act as "matters that are \* \* \* specifically exempted from disclosure by statute," the decision below threatens to destroy the longstanding Congressional guarantee of privacy for information contained in or related to the tax returns of countless numbers of taxpayers. If permitted to stand, the court of appeals' decision will severely impair our self-reporting tax system, which depends upon the willingness of each taxpayer to submit voluntarily all information relevant to his tax liability, with the good faith expectation that the Internal Revenue Service will not disclose it to third parties. The invasion of taxpayer privacy presaged by the public disclosure of such Internal Revenue Service documents, of which there are approximately 400,000 extant, presents a question of great importance concerning both the application of the FOI Act and the administration of the revenue laws. A decision with such far reaching impact upon the Internal Revenue Service, the business community, and the public at large calls for review by this Court.

<sup>3</sup> The district court also ordered disclosure of correspondence, index systems, and files relating to the issuance of 23 revenue rulings (Appendix A, *infra*, pp. 10A-11A). While the court of appeals addressed only the technical advice memoranda and letter rulings, its affirmance requires the disclosure of the other material as well. Although we do not separately discuss these other documents, we submit that they are likewise covered by exemption 3 for the same reasons as are technical advice memoranda and letter rulings.

Moreover, the court of appeals' decision that technical advice memoranda are not covered by exemption 3 squarely conflicts with *Tax Analysts & Advocates v. Internal Revenue Service*, 505 F. 2d 350, 355 (C.A.D.C.). The issue has been and continues to be widely litigated,<sup>4</sup> and resolution of the conflict by this Court is essential in order that there be a uniform national rule.

2. Last Term in *Administrator, Federal Aviation Administration v. Robertson*, No. 74-450, decided June 24, 1975, this Court held that exemption 3 of the FOI Act was intended to exempt from disclosure material covered by the nearly 100 statutes which restrict public access to government records. As the Court there stated, the FOI Act cannot be read as repealing these statutes by implication. See slip op., pp. 9-11.

Section 6103 of the Internal Revenue Code is such a statute announcing a principle of confidentiality of information in the possession of the Internal Revenue Service by virtue of its function as national tax collector. It provides that with certain exceptions not here relevant,<sup>5</sup> tax returns shall be open to public inspection upon order of the President and in accordance with rules and regulations promulgated by

<sup>4</sup> We are advised by the Internal Revenue Service that since May 1, 1975, it has received more than 75 requests under the FOI Act for disclosure of letter rulings and/or technical advice memoranda. There are also six suits pending in the district courts, some of which involve technical advice memoranda.

<sup>5</sup> See Section 6103(b), (c), and (d), respectively, providing for inspection of returns by state officials, shareholders, and committees of Congress.



the President. This statute encompasses excise tax returns reporting or relating to the same information contained in the documents sought by respondents.<sup>6</sup> It is derived from Section 1 of the Act of June 17, 1910, c. 297, 36 Stat. 468, 494, which provided that tax returns would be open to public inspection "only upon the order of the President under rules and regulations \* \* \* approved by the President." Less than one year earlier, Congress had provided in Section 38 Seventh of the Act of August 5, 1909, c. 6, 36 Stat. 11, 116, that it was unlawful for the Treasury "to divulge or make known in any manner not provided by law any document received, evidence taken, or report made \* \* \* except upon the special direction of the President \* \* \*."<sup>7</sup>

The necessity for such a statutory nondisclosure rule for tax information hardly requires elaboration. As this Court observed more than 75 years ago in *Boske v. Comingore*, 177 U.S. 459, 469-470, in upholding the validity of regulations similarly prohibiting the disclosure of Treasury tax records: "The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded." In light of this longstanding policy against the disclosure of information furnished by taxpayers to the Treasury, it is not sur-

<sup>6</sup> Section 6103(a)(2) encompasses, *inter alia*, excise tax returns; Section 6103(a)(1) covers income tax returns.

<sup>7</sup> See also Section IIG(d) of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 116, 177; *United States v. Dickey*, 268 U.S. 378, 387.

prising that Section 6103 of the Internal Revenue Code was one of the 100 statutes to which Congress referred in its formulation of exemption 3. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); House Committee Print, Federal Statutes on the Availability of Information, 86th Cong., 2d Sess. 213-214 (1960); Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1666 and 1663 (in part), 88th Cong., 1st Sess., pp. 179-187 (1963). Thus, in the FOI Act Congress intended to preserve the protective scope of Section 6103. *Association of American Railroads v. United States*, 371 F. Supp. 114, 116-118 (D. D.C.) (three-judge court). See also *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218-219.

Given the large variety of documents submitted by taxpayers to the Internal Revenue Service and those prepared by the agency itself in connection with its determinations of tax liability, the nondisclosure principle in Section 6103 could easily be circumvented if it were limited to filed tax return forms. Taxpayers frequently submit additional information either voluntarily or at the request of the Service in order to explain data reported on their returns. Similarly, at the conclusion of an audit, a revenue agent will prepare a report which refers to items on a return. The taxpayer may in turn file a protest to the agent's conclusions.

Although these documents are not physically part of a prescribed tax return form, they all contain in-



formation either already reported in a return or related to items reported in a return. The congressional policy against disclosure of Internal Revenue Service information relating to the liability of a particular taxpayer can be properly effectuated only if the applicability of Section 6103 depends upon the nature of the information sought and not the title of the particular documents on which it is written. Simply put, the private character of the information in a tax return is not altered for purposes of Section 6103 because it is also recorded on other documents as part of the process of determining tax liability.

This principle emphasizing the substance of the information rather than its form has been incorporated in the Presidential regulations promulgated under Section 6103. Under Section 301.6103(a)-1(a)(3) of those Regulations (26 C.F.R.), the term "return" is broadly defined to include—

(a) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and

(b) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (a) of this subdivision.

By defining "return" to include all documents containing information reported in or related to a return, the Regulations insure that the statutory policy of confidentiality will not be defeated by an overly literal reading of the term "tax return."

In order to effectuate the congressional policy reflected in exemption 3 of the FOI Act to continue the effectiveness of all of the statutes by which Congress had protected the confidentiality of various categories of government documents, Congress intended to protect all groups of documents to which the agencies had applied their nondisclosure statutes. Thus, when Congress in exemption 3 continued the effectiveness of Section 6103 of the Code, it necessarily intended to include the administrative interpretations of the reach of that section. The consistent views and practice of the Executive Branch, reflected in the Presidential regulations, has been that the term "returns" in Section 6103 includes the documents of which respondents here seek disclosure. Exemption 3 therefore covers those documents.

3. In holding that technical advice memoranda and letter rulings were not covered by exemption 3 of the FOI Act, the court of appeals ignored the broad statutory nondisclosure policy expressed in the Presidential regulations. Although technical advice memoranda and letter rulings share common attributes, the error of the court below is best demonstrated by separate analysis of each aspect of its decision.

#### A. TECHNICAL ADVICE MEMORANDA

Technical advice memoranda are issued to a district director in response to his request for instructions from the National Office as to the correct tax treatment of a specific set of facts relating to a named taxpayer. Such requests arise either in connection with

the audit of a return or consideration of a claim for refund. The reply from the National Office consists of two parts: (1) a transmittal memorandum containing information for the district director which can not be disclosed to the taxpayers; and (2) a technical memorandum of facts and law, a copy of which is generally furnished to the taxpayer. See Statement of Procedural Rules, Section 601.105(b)(5)(vi) (26 C.F.R.).

These memoranda are prepared by the Internal Revenue Service in the context of a factual situation of a specific tax return or claim for refund and they necessarily contain information set forth in that return or claim. In terms of the above-quoted regulation, they are "reports \* \* \* relating to \* \* \* [\* \* \* returns \* \* \* filed by \* \* \* the taxpayer \* \* \*]." The fact that such information is also set forth on a separate document known as a technical advice memorandum does not justify its public disclosure any more than a revenue agent's report of his audit of a taxpayer could be disclosed to a person other than the taxpayer or his authorized representative. As the District of Columbia Circuit ruled in *Tax Analysts & Advocates v. Internal Revenue Service*, *supra*, 505 F. 2d at 355, "Technical advice memoranda deal directly with information contained in 'returns made with respect to taxes' and are a part of the process by which tax determinations are made and, thus, 'specifically exempted from disclosure by statute.'"

The court below attempted to distinguish the contrary decision of the District of Columbia Circuit in *Tax Analysts* on the ground that "the [district court's] order here most carefully limits disclosure to 'those portions of responses to Technical Advice requests that are or were intended for issuance to taxpayers'" (Appendix B, *infra*, p. 21A). But the court's distinction suffers from two critical infirmities.

First, the injunctive orders in both cases are identical in requiring only the disclosure of the second part of the technical advice memorandum, *viz.*, the part of the memorandum constituting the Service's audit determination. See *Tax Analysts & Advocates v. Internal Revenue Service*, 362 F. Supp. 1298, 1310 (D.D.C.). Second, the court's statement that such documents are "intended for issuance to taxpayers" misapprehends the nature of the technical advice procedure. Although it is the practice of the Internal Revenue Service to furnish the affected taxpayer with a copy of its memorandum covering the audit determination, this practice cannot authorize the third-party disclosure approved by the court of appeals. The taxpayer is necessarily privy to the information reported in his own tax return; that knowledge, however, is a far cry from making that information available to others. Finally, the furnishing of a copy of the return of a taxpayer to the taxpayer himself is expressly authorized by Section 301.6103(a)-1(c)



(1)(ii) of the Presidential regulations. Thus, the Service's practice of furnishing the affected taxpayer with a copy of the audit determination part of the technical advice memorandum does not breach the nondisclosure rule of Section 6103.

#### B. LETTER RULINGS

Letter rulings are comparable to technical advice memoranda. They are written statements issued to a taxpayer by the National Office of the Internal Revenue Service in which the tax law is applied to a given set of facts. Letter rulings are given with respect to both completed and prospective transactions. When the transaction is subsequently reported in a tax return, the auditing agent simply compares the information on the return with the facts in the ruling. If there is no variance, the conclusion of the ruling will determine the tax treatment of the transaction.

A letter ruling consists of a detailed recital of relevant facts submitted by the taxpayer, setting forth the same type of information contained in a tax return, followed by a statement of conclusions. Such rulings are not published or publicly disclosed. It is established that taxpayers may not rely upon a letter ruling issued to another taxpayer, and that Internal Revenue Service officials may not rely upon or cite such rulings as precedents in the disposition of another case. See Statement of Procedural Rules, Sections 601.201(e)(2) and 601.201 (1)(1); Rogovin, *The Four R's: Regulations, Rulings, Reli-*

*ance and Retroactivity*, 43 Taxes 756, 757, 763-765 (1965).

In concluding that the excise tax letter rulings were not covered by exemption 3, the decision below followed a similar holding with respect to income tax letter rulings in *Tax Analysis & Advocates v. Internal Revenue Service*, *supra*, 505 F. 2d at 351-355. In that case, the court concluded that "letter rulings generated by the voluntary request of a taxpayer for tax advice from the IRS are beyond the scope of that which the Congress sought to protect under section 6103, that is, 'returns' filed under compulsion of law which contain information necessary to determine federal tax liability" (*id.* at 354 n. 1). However, the purported voluntary nature of a ruling request is refuted by the fact that there are many instances in which the Internal Revenue Code requires the issuance of a letter ruling as a condition of a particular tax result. For example, a ruling is required in connection with certain transactions involving foreign corporations (Section 367) and the transfer of appreciated securities to certain foreign entities (Section 1492), and the change of an accounting period (Section 442).<sup>8</sup> In no sense, therefore, are all ruling requests voluntary.

At all events, whether a ruling request is voluntary or mandatory under the Code, the significant fact for purposes of the nondisclosure policy of Section

<sup>8</sup> Other Code provisions requiring the issuance of a ruling as a condition to a particular tax consequence include Sections 446(e), 507(b), 514(b)(3)(A), 4942(g)(2), and 4945(g).

6103 is that it contains information of the same character as that set forth in the taxpayer's return. Just as a technical advice memorandum incorporates information from a tax return in the context of a present audit, a letter ruling sets forth a detailed statement of facts in the context of what is essentially an advance audit. Both documents necessarily include confidential information relating to the taxpayer's profits, expenses, the nature of the taxpayer's business, and the like.

Indeed, the court in *Tax Analysts* acknowledged (505 F. 2d at 354 n. 1) that a ruling involving a subsequently executed transaction required to be reported on a return would "relate" to a return within the meaning of the Presidential regulations under Section 6103. But even with respect to a transaction that may not be executed, the likelihood that the ruling would recite facts that have been or will be reported in the taxpayer's return is sufficiently strong to warrant the application of the statutory nondisclosure rule. The simple act of copying such information onto a separate document should not destroy its statutory guarantee of privacy whether that separate document is called a technical advice memorandum or a letter ruling.

4. Contrary to the court of appeals' decision, the *in camera* inspection procedure ordered by the district court in which the Internal Revenue Service might object to disclosure of specific portions of the documents would not satisfy the terms or policy of the nondisclosure rule of Section 6103. Pursuant to that

provision, the Service is prohibited from disclosing the entire text of its letter rulings and technical advice memoranda and not simply those portions it deems to be confidential.

Moreover, the process of determining which portions of such documents are confidential involves difficult questions of judgment and the Service's conclusions in this regard might well differ from that of the affected taxpayer. Because errors in judgment might irreparably damage the innocent subjects of these documents, fairness suggests that the taxpayer be given an opportunity to object to disclosure and, if necessary, to contest what he believes to be an invasion of his privacy. However, the taxpayer's very act of contesting disclosure would necessarily reveal his identity as the recipient of such documents, and thereby invade the very privacy interest he seeks to protect.

The prospect of such protracted three-cornered proceedings involving the plaintiffs in these suits, the Internal Revenue Service, and affected taxpayers with respect to the approximately 400,000 extant letter rulings and technical advice memoranda, eloquently demonstrates the impracticality of the *in camera* procedure contemplated by the decision below. In providing in exemption 3 for nondisclosure of all matters "specifically exempted from disclosure by statute," Congress did not intend to impose on the lower federal courts the heavy burden of editing this enormous number of documents and the responsibility of insuring taxpayer privacy.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1975.

**APPENDIX A**

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF  
MICHIGAN, SOUTHERN DIVISION

Civil No. 4-70345

FREUHAUF CORP., a Michigan corporation, WILLIAM E.  
GRACE, AND ROBERT D. ROWAN, PLAINTIFFS

v.

INTERNAL REVENUE SERVICE, DEFENDANT

**MEMORANDUM RE UNLAWFUL WITHHOLDING OF RECORDS**

Plaintiffs herein commenced this action by filing their COMPLAINT REQUESTING AN INJUNCTION AGAINST UNLAWFUL WITHHOLDING OF RECORDS AND AN ORDER FOR PRODUCTION OF SUCH RECORDS. The action is brought pursuant to the Freedom of Information Act, 5 U.S.C.A. § 552. Plaintiffs here are defendants in a criminal action (No. 45325) in this court, brought by the United States against them in a one-count indictment that charges a conspiracy to:

(1) Defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service (IRS) of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of \$12,344,587.31 in Federal Manufacturer's Excise Taxes;

(2) Attempt to evade and defeat (contrary to Section 7201, Title 26, United States Code),



the payment of \$12,344,587.31 in Federal Excise Taxes to be due and owing and due and owing to the United States by the FRUEHAUF CORPORATION for the period October 1, 1956, through December 31, 1965:

(3) Aid or assist in, and procure, counsel and advise the preparation and presentation (in violation of Section 7206(2), Title 26, United States Code); of materially false and fraudulent Excise Tax Returns (IRS Form 720) for the defendant FRUEHAUF CORPORATION for all calendar quarter years beginning October 1, 1956, and ending December 31, 1965, the returns understating the amount of Excise Tax payable by FRUEHAUF CORPORATION totaling \$12,344,587.31.

During the course of pretrial discovery proceedings in the criminal case the defendants therein sought to obtain from the Government various records and material within the possession of the Government which they claimed would supply information essential to their defense. The position of the Government was that these were not properly subject to discovery in the criminal case but they could be obtained under the provisions of the Freedom of Information Act. The defendants in said criminal case then filed the instant civil action against the Internal Revenue Service. (The Court, in the criminal case, denied the discovery there sought by defendants on the theory that the Government appeared to be willing to furnish the information sought, pursuant to the Freedom of Information Act.) Subsequent to the filing of the instant action under the Freedom of Information Act the Government's position is that the documents sought are not available to plaintiffs under the Freedom of Information Act.

In their Answers to Interrogatories filed November 27, 1973, at page 2 thereof, plaintiffs give a general description of said documents as follows:

In general, Plaintiffs seek copies of unpublished private rulings and/or rulings, as defined in the complaint, originating in the Miscellaneous and Special Provisions Tax Division, Excise Tax Branch, Office of Assistant Commissioner (Technical), Internal Revenue Service, between January 1, 1947 and June 26, 1973 to manufacturers of automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, and tractors of a kind chiefly used for highway transportation in combination with a trailer or semitrailer, or to any trade association of any one or more such manufacturers. In paragraphs 5a(1)(a) through 5a(1)(h) of Plaintiffs' Complaint, the specific subject matters of rulings requested are described in detail.

The specific subject matters of the rulings requested are set forth in the paragraphs as above indicated. They relate to those types of determinations which plaintiffs conceive to be relative to their defense of the charges contained in the indictment in the criminal case.

The Government filed its Motion for Summary Judgment requesting dismissal on the grounds that the "requested documents are exempt from disclosure under Section 552(b)(3), Title 5 U.S.C. because of Section 6103 of the Internal Revenue Code of 1954."

The parties have filed extensive briefs herein, and the Court file contains numerous pleadings including various sets of interrogatories and answers thereto.



Plaintiffs' Answers to Interrogatories filed November 27, 1973 (docket entry No. 18) contains the following paragraph, which we deem of controlling significance:

The documents sought are essential to the proper defense of the criminal case in view of the fact that under the authority of *International Business Machines Corporation v. U.S.*, 343 F. 2d 914 (Ct. Cl. 1965), cert. den. 382 U.S. 1028, if rulings were issued to other taxpayers which provided a benefit to those taxpayers which Fruehauf did not enjoy, then Fruehauf is entitled to the benefit of such rulings. The basis for this theory is Section 1108(b) of the Revenue Act of 1926 which provides that if the Service has issued a ruling, Treasury decision or regulation holding the sale or lease of an article was not taxable and a taxpayer has parted with possession of an article relying upon the ruling, regulation, or Treasury decision, that such item was not taxable, then no tax shall be levied, assessed or collected. In the case of *International Business Machines Corporation v. U.S.*, *supra*, the Court of Claims had presented to it the question of whether, if such a ruling were granted to a third party, the benefit of such ruling must also be granted to other taxpayers. The Court of Claims concluded that in view of the fact that a ruling, which had been issued to one taxpayer, could not be revoked retroactively, that such ruling must be made available to other taxpayers during the period it was unrevoked in order to carry out the intent of Congress that excise tax not be applied in a discriminatory manner. Thus, under the authority of such case, private rulings which were issued and which remained unrevoked during any period covered by the criminal case must be available to Plaintiffs. Plaintiffs have reason to believe that private

rulings which would be favorable do exist, and Plaintiffs are entitled to rely upon such rulings in their defense in the criminal case.

The Freedom of Information Act, 5 U.S.C.A. § 552 (b) sets forth nine exceptions to the statutory disclosure act. The one relied upon by the Government—

“(b) This section does not apply to matters that are—

\* \* \* \* \*

“(3) specifically exempted from disclosure by statute;” 5 U.S.C.A. § 552(b) (3).

is relied upon, the Government says, because of 26 U.S.C.A. § 6103. We consider that none of the nine exceptions has application to the material here sought by plaintiffs and that 26 U.S.C.A. § 6103 provides for the protection of the privacy of persons filing *Income Tax Returns*. To the extent that any of the material sought by plaintiffs might constitute an invasion of the privacy of taxpayers there are means that may be employed to avoid such disclosure. In furnishing plaintiffs the information relevant to their defense there need be no violation of Section 6103 of Title 26 of the Internal Revenue Code.

The Sixth Circuit has provided us with guidelines and helpful discussion concerning the Freedom of Information Act in the case of *Hawkes v. Internal Revenue Service*, 467 F. 2d 787 (1972). Although the facts in that case are entirely different from the instant situation the opinion of the Court of Appeals in *Hawkes* convinces this Court that the material here sought by plaintiffs should be made available to them and that such material as they seek does not come within the nine exceptions set forth in the Act.

An order in accordance with the foregoing may be presented on notice.

THOMAS P. THORNTON,  
*United States District Judge.*

Dated: January 11, 1974.

[Filed and Entered January 30, 1974]

In the United States District Court for the Eastern  
District of Michigan

Civil No. 4-70345

FRUEHAUF CORPORATION, A MICHIGAN CORPORATION,  
ET AL., PLAINTIFFS

v.

INTERNAL REVENUE SERVICE, DEFENDANT

*Order*

At a session of said Court held in the Federal Building, City of Detroit, County of Wayne, and State of Michigan, on January 30, 1974.

Present: Honorable THOMAS P. THORNTON, District Court Judge

Upon the considerations expressed in the Court's Opinion entered herein on January 11, 1974 and upon consideration of the entire record herein, it is,

ORDERED, That Defendant's Motion for Summary Judgment be and hereby is denied, and it is

FURTHER ORDERED, that pursuant to 5 U.S.C. 552 and Rule 65(a)(2) of the Federal Rules of Civil Procedure, Defendant, its agents, attorneys and employees are permanently enjoined from withholding the records requested by Plaintiffs and it is,

FURTHER ORDERED, that commencing from the date upon which Defendant is personally served with a true copy of this Order, and continuing for such rea-

sonable length of time as may be necessary, Defendant shall make available to Plaintiffs for inspection and copying, all of the following records and documents intact and without deletion, except for those items which, within said period of time, Defendant submits to the Court, or to a Special Master, to be appointed by the Court, sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the Court or his Special Master, as to whether the proposed deletions are justified under the Freedom of Information Act, together with a detailed written explanation of the justification for each deletion:

(1) All unpublished private rulings and/or letter rulings originating in the Miscellaneous and Special Provisions Tax Division, Excise Tax Branch, of the Office of Assistant Commissioner (Technical), Internal Revenue Service, which were issued between January 1, 1947 and to September 13, 1973 to manufacturers of automobile truck chassis, automobile truck bodies, truck and bus trailer and semi-trailer chassis, truck and bus trailer and semi-trailer bodies, and tractors of a kind chiefly used for highway transportation in combination with a trailer or semi-trailer, or to any trade association of any one or more such manufacturers, in which determinations were made of:

(a) All items includable or excludable in the price for which a taxable article is sold under section 4216 (a) of the Internal Revenue Code (or any predecessor section) and any Regulations issued pursuant thereto.

(b) The methods, means, formulae or procedures for determining or computing, by a manufacturer of taxable articles, the applicable constructive sales price, under section 4216(b), section 4216(b)(1), and section 4216(b)(2), of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued

pursuant thereto, upon sales by such manufacturers to:

- (1) a retailer
- (2) a wholesaler
- (3) a wholesaler distributor
- (4) a user or ultimate consumer

(c) The existence or non-existence under section 4216(b) of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued pursuant thereto, particularly (without limitation) Treasury Regulations Section 148.1-5 and Treasury Regulations 46(1940), Sections 216.8, 316.10, 316.12, 316.13, 316.14, and 316.15, of:

- (1) a retailer
- (2) a wholesaler
- (3) a wholesaler distributor
- (4) sales at retail
- (5) sales at wholesale
- (6) sales to wholesale distributors

(d) The methods, means, formulae, or procedures for determining or computing, by a manufacturer of taxable articles, the applicable exclusion of *local* advertising charges from the sales prices of taxable articles under section 4216(f) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(e) The methods, means, formulae, or procedures for determining or computing, by a manufacturer of taxable articles, the credit for tax paid on tires or inner tubes under section 6416(c) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(f) The definition of the term "the purchase price" as used in section 6416(c)(1) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.



(g) The definition(s) of taxable and nontaxable trailers, semi-trailers, truck and bus trailers and semi-trailer chassis, truck and bus trailer and semi-trailer bodies and containers under section 4061(a) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(h) The methods, means, formulae or procedures for computing the applicable tax under sections 4061(a) and 4216(b) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto on a projected or estimated basis instead of upon an article by article basis.

The terms "private rulings and/or letter rulings" shall include (without limitation) both ordinary letter rulings, unpublished private rulings, and those portions of the responses to Technical Advice requests that are or were intended for issuance to taxpayers.

(2) The files including correspondence, analysis and submissions of fact applicable to the issuance of:

Revenue Ruling 62-68, 1962-1 CB 216  
 Revenue Ruling 68-254, 1968-1 CB 479  
 Revenue Ruling 68-202, 1968-1 CB 477  
 Revenue Ruling 68-519, 1968-2 CB 513  
 Revenue Ruling 69-394, 1969-2 CB 206  
 Revenue Ruling 54-25, 1954-1 CB 258  
 Revenue Ruling 54-448, 1954-2 CB 412  
 Revenue Ruling 54-61, 1954-1 CB 259  
 Revenue Ruling 283, 1953-2 CB 425  
 Revenue Ruling 62-221, 1962-2 CB 251  
 Revenue Ruling 63-238, 1963-2 CB 519  
 Revenue Ruling 58-287, 1958-1 CB 426  
 Revenue Ruling 60-241, 1960-2 CB 329  
 Revenue Ruling 59-74, 1959-1 CB 350  
 Revenue Ruling 59-163, 1959-1 CB 353  
 Revenue Ruling 65-9, 1965-1 CB 491

Revenue Ruling 60-185, 1960-1 CB 412

Revenue Ruling 69-580, 1969-2 CB 209

Revenue Ruling 69-568, 1969-2 CB 209

Revenue Ruling 71-240, 1971-1 CB 372

Revenue Ruling 68-509, 1968-2 CB 508

Revenue Ruling 70-54, 1970-1 CB 218

Revenue Ruling 73-231, IRB 1973-21, 11

(3) Communications with respect to such private rulings and/or letter rulings received by the Internal Revenue Service from persons outside the Executive Branch of the United States Government (including, without limitations, members of Congress, Congressional staff members, and persons acting on behalf of the parties seeking rulings), together with the responses of the Internal Revenue Service to these outside communications. The communications requested include (without limitation) letters, conference memoranda, and memoranda of telephone conversations, and it is,

(4) All items of the letter ruling indexing systems of the Internal Revenue Service as will enable Plaintiffs to ascertain whether additional unpublished private rulings and/or letter rulings, similar to those ordered available above, have been issued by the Treasury, including, but not limited to;

(a) the index-digest card file which is maintained by the Office of the Assistant Commissioner (Technical) involving "reference" (formerly "precedent") private and/or letter rulings files; and

(b) the sets (blocks) of cards maintained in alphabetical order by the Technical Records Section of Defendant that separately refer to all Technical files by taxpayer name and date of the file, beginning in 1954, involving "routine"

(formerly "non-precedent") private and/or letter rulings files, and it is

FURTHER ORDERED, that Defendant shall not destroy or otherwise dispose of or alter any of the foregoing records and documents without the prior approval of this Court, after notice to the Plaintiffs.

(S) Thomas P. Thornton  
THOMAS P. THORNTON,  
*Judge.*

A true copy, Henry R. Hanssen, Clerk, by V. Barrow, Deputy Clerk.

## APPENDIX B

In the United States Court of Appeals for the Sixth Circuit

No. 74-1474

FRUEHAUF CORPORATION, WILLIAM E. GRACE AND  
ROBERT D. ROWAN, PLAINTIFFS-APPELLEES

*v.*

INTERNAL REVENUE SERVICE, DEFENDANT-APPELLANT

*On appeal from the United States District Court for  
the Eastern District of Michigan*

Decided and Filed June 9, 1975

Before MILLER, LIVELY, and ENGEL, Circuit Judges.

ENGEL, Circuit Judge. In this action brought by plaintiffs under the Freedom of Information Act, 5 U.S.C. § 552, (F.O.I.A.), the Internal Revenue Service appeals from an order of the district court requiring that agency to make available for inspection and copying a large number of documents in the possession of the Excise Tax Branch of the Miscellaneous and Special Provisions Tax Division of the Office of Assistant Commissioner (Technical). The documents ordered to be produced consist primarily of unpublished private and letter rulings relating to the manufacturers excise tax as imposed upon sales of trucks and trailers, but also include the files underlying twenty-three published Revenue Rulings, communications between the Service and persons outside the Executive

Branch, and indices and card files relating to the foregoing. The complete list of documents is described in the court's order, which is attached hereto as Appendix A.

The information sought does not pertain to the federal income tax, but is confined to interpretations of the manufacturers excise tax under Section 4061 (a) of the Internal Revenue Code, 26 U.S.C. § 4061 (a), and the definition of the price for which an article is sold as set forth in Section 4216.

The order appealed from specifically provides that the described documents shall be made available intact and without deletion,

"except for those items which, \* \* \* defendant submits to the court \* \* \* sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the court \* \* \*, as to whether the proposed deletions are justified under the Freedom of Information Act together with a detailed written explanation of the justification for each deletion \* \* \*"

The government opposed disclosure below, claiming that the documents requested were exempt under one of the nine exemptions to the Act, § 552(b)(3), which provides that the Act is not applicable to matters "specifically exempted from disclosure by statute". The Service urges that, as described in the district court's order, the documents are exempt under the Internal Revenue Code, 26 U.S.C. §§ 6103, 7213. Section 6103 provides in part, that

"\* \* \* All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, and subchapter B, chapter 37, and chapter 41, shall constitute public records and shall be open to

public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President." 26 U.S.C. § 6103(a)(2)

Section 7213 provides for criminal penalties for disclosure by government employees of certain information, including income returns, sources of income and profits.<sup>1</sup>

<sup>1</sup> 26 U.S.C. § 7213, Unauthorized disclosure of information. Subsection (a)(1) provides:

"(a) Income Returns—(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

Subsection (b) provides: "(b) Disclosure of Operations of Manufacturer or Producer.—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment."



The government further asserts that the district court had and should have exercised equitable discretion to withhold the relief even if it were otherwise called for under the Act.

We reject both of these contentions and affirm the judgment of the district court. We hold that while the district court erred in construing 26 U.S.C. § 6103 as extending the protection of privacy to persons filing income tax returns only, its order for disclosure was nonetheless proper when construed to reserve in the court the right, upon *in camera* inspection, to deny disclosure of any specific documents in which the deletion of protected matter will not suffice to preserve any exemption which may be validly asserted with respect thereto.

We also reject the appellants' argument that "even assuming, *arguendo*, that the documents in issue are not specifically exempt from disclosure by statute, \* \* \* the district court erred in failing to exercise its equitable jurisdiction to decline to issue an order compelling disclosure".

It is important to understand at the outset what this appeal does not involve. First, no issue is raised that the documents sought, as numerous as they may be, are not "identifiable records" within the meaning of § 552(a)(3). Second, no constitutional question is presented. Third, no claim is made that *in camera* inspection by the trial court to sift out privileged matter is forbidden, as is classified matter under subsection (b)(1) of the Act, *EPA v. Mink*, 410 U.S. 73 (1969).

Finally, while the Act lists nine exemptions to which its provisions shall not apply, the Internal Revenue Service relies only upon that contained in subsection (b)(3), matters "specifically exempted from disclosure by statute".

As the Supreme Court pointed out in *EPA v. Mink, supra*, the F.O.I.A. was enacted in response to the shortcomings of its predecessor, Section 3, which "was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute". 410 U.S. at 79. While the Act may have its imperfections in drafting,<sup>2</sup> the intent of the Congress that issues of construction be resolved in favor of public disclosure is unmistakable, and our circuit as well as others, has consistently recognized this. *Tennessean Newspapers, Inc. v. Federal Housing Administration*, 464 F. 2d 657 (6th Cir. 1972); *Hawkes v. I.R.S.*, 467 F. 2d 787 (6th Cir. 1972); *Soucie v. David*, 448 F. 2d 1067 (D.C. Cir. 1971).

The Act places upon the agency the burden to impose specific objections to disclosure, and to show that nondisclosure is permitted under one of the nine specifically enumerated exemptions. *EPA v. Mink, supra*, at 79. The policy of the Act favors disclosure and thus mandates that the exemptions be construed narrowly. *Soucie v. David*, 448 F. 2d 1067 (D.C. Cir. 1971).

The government contends that the letter rulings and other materials sought constitute "returns" within the meaning of 26 U.S.C. § 6103, or are exempt as privileged material under 26 U.S.C. § 7213. It asserts that certain of the documents may be attached to an excise tax return or may involve information contained in a tax return, and claims broadly that it was the "obvious intent of Congress to restrict access to all documents associated with the administration of the tax laws".

<sup>2</sup> This is the position taken by Professor Kenneth Davis. See Davis, *Administrative Law Treatise* (1970 Supplement) at 115.

While an injunction has been issued and stayed pending appeal, neither the trial court nor this court has had the opportunity to examine the precise documents desired to determine whether they are subject to disclosure. We thus find ourselves in much the same position as we did in *Hawkes v. Internal Revenue Service*, 467 F. 2d 787 (6th Cir. 1972). In that case disclosure of certain portions of an Internal Revenue Manual by a taxpayer indicted for tax fraud was opposed on the assertion that disclosure was excluded under 5 U.S.C. § 552(b)(2), excluding matters "related solely to the internal personnel rules and practices of an agency". As Judge Celebrezze there observed:

"Neither this court nor the district court has examined the Manual portions sought. It is therefore impossible for us to state authoritatively which portions are subject to compulsory disclosure, although it would appear that several sections at least of the Manual would provide guidance as to the Service's understanding of substantive law and relevant procedures and would therefore be subject to disclosure under (a)(2)(C). *In camera* [italics in quoted text] inspection of the Manual would provide a basis for application of the guidelines for disclosure suggested in this opinion and a remand for such inspection and evaluation seems reasonable." *Hawkes v. I.R.S. supra*, at p. 796.<sup>3</sup>

Formulated on the guidance of *Hawkes, supra*, the district court injunction permits submission to the

<sup>3</sup> *Hawkes* was remanded to the district court for *in camera* examination. Following such examination the district court concluded the materials were subject to disclosure and ordered the materials made available to plaintiff. This court affirmed that decision in *Hawkes v. I.R.S.*, 74-1190 (decided and filed December 23, 1974).

court for *in camera* inspection of any documents in which the Service believes deletions are justified.

The position of the Service is broad rather than specific, perhaps in part because the order itself deals more in categories than in specifically identified documents. For this reason we conceive our role at this stage to be limited largely to determining whether the types of documents described are so clearly within the exemption of 26 U.S.C. §§ 6103 and 7213 that the injunctive order appealed from must be reversed and the suit under the Act dismissed. We determine that the Service has not maintained its burden of showing, at this stage, that the material requested is within the specific exemptions of the statutes relied upon so as to make reversal necessary.

The nature of certain of the documents sought, however, is known and can be ruled upon on a categorical basis. Letter rulings, as such, have a rather well defined meaning. The Secretary of the Treasury has defined a letter ruling as:

"A written statement issued to a taxpayer or his authorized representative by the national office which interprets and applies the tax laws to a specific set of facts." Treas. Reg. § 601.201(a)(2).

See also *Tax Analysts and Advocates v. I.R.S.*, 505 F. 2d 350, 352, (D.C. Cir. 1974).

We hold that letter rulings are not "returns" within the meaning of 26 U.S.C. § 6103 and hence are not exempt for that reason under § 552(b)(3) of the Act. We are in agreement with the rationale of the District of Columbia Circuit in *Tax Analysts and Advocates v. I.R.S.*, 505 F. 2d 350 (D.C. Cir. 1974), and with that of Professor Davis in his treatise, Davis, *Admin. Law Treatise*, (1970) § 3A.9 at 130. In *Tax Analysts*,



*supra*, the court emphasized that such letter rulings are generated by the agency rather than the taxpayer. It further stated:

Letter ruling are issued at the request of taxpayers seeking advice as to the tax consequences of specific transactions. This information provides guidance in planning and conducting their business affairs and, if the transaction is consummated, aids in preparation of their tax returns. The fact that taxpayers may elect to follow the Internal Revenue Service's recommendations that letter rulings be attached to returns containing information about the transactions referred to in the letter rulings does not *deprive a letter ruling of its separate status as a "final opinion" and "interpretation" nor does it make the attachment part of a return.* Attachment is to alert the District Director of the Internal Revenue Service that a letter ruling had been issued. The appropriate District Director is always sent a copy at the time a letter ruling is issued to any taxpayer required to file a return in his district. 505 F. 2d at 354-355.

We also agree with the court in *Tax Analysts* that letter rulings are not rendered exempt by Treasury Regulation § 301.6103(a)-I(a)(3) (Feb. 8, 1972), which amended the earlier definition of "return" and broadened it. While certain letter rulings may fall within the literal language of that regulation, we agree that the regulations, promulgated here by the regulated agency, "cannot immunize letter rulings from disclosure under the Freedom of Information Act", beyond that which Congress intended to protect under § 6103. 505 F.2d at 354, n. 1.

The District of Columbia Circuit further ruled in *Tax Analysts* that, under §§ 6103 and 7213 of the Internal Revenue Code, technical advice memoranda written in conjunction with income tax returns were

exempt from disclosure under § 552(b)(3). We do not reach that precise question here as the order here most carefully limits disclosure to "those portions of responses to Technical Advice requests that are or were intended for issuance to taxpayers". So limited, and with the retained power in the court to make necessary deletions, we think such portions do not come within the exemption of § 6103.

In his memorandum opinion, the district judge below observed:

"We consider that none of the nine exceptions has application to the material here sought by plaintiffs and that 26 U.S.C.A. § 6103 provides for the protection of the privacy of persons filing *Income Tax* returns. To the extent that any of the material sought by plaintiffs might constitute an invasion of the privacy of taxpayers, there are means that may be employed to avoid such disclosure. In furnishing plaintiffs the information relative to their defense there need be no violation of Section 6103 of Title 26 of the Internal Revenue Code." 369 F. Supp. at p. 110.

The quoted language is troublesome in two respects. First, we agree that probably none of the exceptions is applicable to the extent at least that it bars disclosure of the requested documents as a class or group. We do not read it as meaning, however, that a given specific document which is finally delivered over for *in camera* inspection may not contain material which is excludable as within one of the exempted categories. Indeed, so much seems to be recognized by the broad language of the order referring to "whether the proposed deletions are justified under the Freedom of Information Act." Second, it is apparent from an examination of the language of § 6103 that the district judge erred at least to the extent of holding that § 6103

(a) (2) applies only to income tax returns. It does not, but rather expressly applies as well to taxes imposed under chapter 32, which of course relates to excise taxes. Since, therefore, the possibility remains that the exemption of § 6103 may be found to apply to a specific document which may be delivered over for *in camera* inspection, the district judge will wish to bear this in mind during inspection. This is particularly true with respect to any inspection of files applicable to the issuance of the enumerated Revenue Rulings under Section (2) of the order. The order as entered, however, appears to retain sufficient flexibility to permit this determination to be properly made by the trial court.

A further complaint of the Internal Revenue Service is that the district court's opinion made no mention of its claim that a further exemption from disclosure of the requested documents is created by the provisions of 26 U.S.C. § 7213 (a) and (b). The government argues that "while concededly its specific terms do not encompass excise tax returns *per se*, logic dictates the conclusion that it applies to information submitted in connection with such returns."

Section 7213(a) quite expressly refers to *income* returns, both in its heading and repeatedly throughout the body of the text. Unlike Section 6103(a) (2), Section 7213(a) makes no reference to "chapter 32" or otherwise evinces an intent to include information regarding *excise* tax returns within its scope. Contrary to the assertion of the government, logic supports the more restricted meaning, especially since the section imposes criminal penalties. We have been shown no authority to the contrary.<sup>4</sup>

<sup>4</sup> *Tax Analysts and Advocates v. I.R.S.*, *supra*, of course did not involve a dispute as to the applicability of § 7213 to excise taxes. That case involved documents related to income tax only.

Section 7213(b) is more general in scope than (a) and is not geared to the return of any particular tax. It is directed toward precluding disclosure of certain types of information obtained by officers or employees as a consequence of a visit by such persons to any manufacturer or producer in the discharge of official duties. The order as framed does not reveal that any such type information is contained within the documents affected. However, if upon *in camera* inspection, material covered by § 7213(b) should appear, we believe the order of the district judge retains sufficient flexibility in the court to protect against its disclosure.

#### EQUITABLE JURISDICTION ISSUE

The government contends that if the documents in issue are not specifically exempt from disclosure by statute, the district court nonetheless erred in declining to exercise its equitable discretion to refuse disclosure, relying upon certain language in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 20 (1974):

"With the express vesting of equitable jurisdiction in the district court by § 552(a) there is nothing to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court."<sup>5</sup>

The Service also relies upon the comments of Professor Davis in his *Administrative Law Treatise*:

"The equity practice is clear and strong. The court that has jurisdiction to enforce the information Act also has jurisdiction to refuse to enforce it whenever equity traditions so require." (1970 Sup.), § 3A.6, at 124

<sup>5</sup> The Service relies upon *Renegotiation Board v. Bannerkraft*, 415 U.S. 1 (1974), as support for its claim that the power to



Many of the arguments proffered by the government in support of its contention that relief should be withheld here are those which have been considered and rejected by Congress. Indeed, the government argues not that the "equities" or facts of this particular case necessitate non-disclosure, but that the categories of documents requested should, for general policy reasons, be exempt. We find these reasons inadequate in light of the clear intent of Congress favoring disclosure.

The legislative history to the Act reveals that Congress did not intend general notions such as "public interest" to shield information from the public:

"Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—'requiring secrecy in the public interest', or 'required for good cause to be held confidential.'

"It is the purpose of the present bill to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld." Senate Rep. No. 813, 89th Cong., 1st Sess. at p. 3.

grant equitable relief carries with it the power as well to deny it upon a showing of valid equitable considerations to the contrary. The case, however, involved the issue of whether equitable discretion could be employed to grant additional remedies and not whether the discretion would permit a withholding of relief under the Act.

The Internal Revenue Service urges that its letter ruling program will be destroyed if the rulings are disclosed. In addition to the fact that no proof of this appears on the record, this is an argument for the legislature, not the court.

As an alternative to an outright ban on all disclosures, the Service asks "that this court should at a minimum modify the district court order to preserve the confidentiality of documents and correspondence in the Internal Revenue Service's possession" primarily because, it urges, much of the information was submitted in the good faith belief that the documents would be kept confidential. In effect, the Service asks that any ruling which makes such documents generally disclosable should be prospective only, so that administrative procedures may be adopted to protect against unwarranted disclosure of confidential business information submitted by taxpayers and so that in the drafting of its rulings in the future, the Service can delete such confidential commercial and financial data as might otherwise have been incorporated in them.

We read this request as simply another way of saying that the plaintiffs should be denied the information they seek.<sup>6</sup> They did not come into court as champions of a cause, but as citizens seeking information to which they claim they were entitled under the Act.

The difficulty with the position of the Service is that it claims altogether too much protection from disclosure and offers altogether too little specific justifica-

<sup>6</sup> The record does not contain a judicial finding that requests by taxpayers for letter rulings are in fact made upon the assurance that the rulings will be kept confidential. Indeed, the government admits that a small number of such rulings, after editing, are published each year by the I.R.S. The government does not state whether taxpayer consent is obtained. [Response to Request for Admissions, No. 14].

tion. This position is not unlike that rejected by this court in *Tennessean Newspapers v. Federal Housing Administration, supra*, in which Judge Edwards observed that "such a view, carried to its logical conclusion, would allow the District Court to review a petition for disclosure totally independent of the Freedom of Information Act and its purposes and standards."<sup>7</sup> 464 F. 2d at 661. While our ruling in that case must necessarily be understood in the context of the practical and equitable considerations set forth in *EPA v. Mink, supra*, we do not conceive that the traditional equitable powers of the district court justify it or us in adding a tenth or eleventh exemption to the nine specifically enumerated in the Act, nor do we conceive that we may postpone the effective date of its operation.<sup>8</sup>

<sup>7</sup> In *Tennessean Newspapers v. Federal Housing Administration*, 464 F. 2d 657 (6th Cir. 1972), the district court had ordered disclosure of an appraisal, but permitted the withholding of the name of the appraiser. We reversed, holding that in the context of that case, the district court was without power to "vary the standards" established by the Act by permitting non-disclosure "absent the applicability of one of the specific exemptions".

<sup>8</sup> The Service cites *Evans v. Department of Transportation of the United States*, 446 F. 2d 821 (5th Cir. 1971), *cert. denied* 405 U.S. 918 (1972), as authority that courts should not permit disclosure of information submitted with the understanding that it would be kept confidential. The difference between *Evans* and the facts here is apparent. *Evans* dealt with a specific document submitted by a confidential informer with the express reservation that his identity would remain confidential. Such information was specifically exempted under 49 U.S.C. § 1504. Further, it was held that the information sought in that case was a part of an investigatory file compiled for law enforcement purposes within the meaning of subsection (b)(7) of the Act. No claim under that subsection has been made in these proceedings to date.

## CONCLUSION

In conclusion, we stress as we did in the first *Hawkes* case, 467 F. 2d 787, *supra*, that the merits of any claim of exemption of a particular document are not before us. See also *Renegotiation Board v. Bannerkraft Co., supra*, at 26. Any such claims must yet be decided by the district court upon invocation of the *in camera* inspection provision in its order. We are satisfied that the order as entered contains sufficient flexibility for its implementation to permit the express purposes of the Act to be carried out in a manner consistent with equitable principles and fairness to all involved. In addition to the guidance already available in the decisions of this circuit, we believe the district court will be able to draw upon the practical alternative remedies to an onerous document-by-document *in camera* inspection by the trial judge, as pointed out in *EPA v. Mink, supra*, 410 U.S. at p. 93. Imaginative procedures, such as those suggested in *Mink*, should in large measure alleviate the apprehended governmental burden and substantially reduce the 6,000 hours which its affiants estimate to be required to produce and examine the requested documents.

Accordingly, the judgment of the district court is affirmed and the case remanded to the district court for further proceedings.



## APPENDIX C

In the United States Court of Appeals for the Sixth  
Circuit

No. 74-1474

FRUEHAUF CORPORATION, WILLIAM E. GRACE, AND  
ROBERT D. ROWAN, PLAINTIFFS-APPELLEES  
*v.*

INTERNAL REVENUE SERVICE, DEFENDANT-APPELLANT  
Before MILLER, LIVELY, and ENGEL, Circuit Judges.

### *Judgment*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said district court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings.

It is further ordered that plaintiffs-appellees recover from the defendant-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said district court.

ENTERED BY ORDER  
OF THE COURT  
(S) JOHN P. HEHMAN  
*Clerk.*

Entered: June 9, 1975.

(28A)

## APPENDIX D

[Filed, August 8, 1975, John P. Hehman, Clerk.]

In the United States Court of Appeals for the Sixth  
Circuit

No. 74-1474

FRUEHAUF CORPORATION, WILLIAM E. GRACE, AND  
ROBERT D. ROWAN, PLAINTIFFS-APPELLEES  
*v.*

INTERNAL REVENUE SERVICE, DEFENDANT-APPELLANT  
Before MILLER, LIVELY and ENGEL, Circuit Judges

### *Order*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

ENTERED BY ORDER OF  
OF THE COURT  
(S) JOHN P. HEHMAN  
*Clerk.*

(29A)

## APPENDIX E

5 U.S.C. 552 [AS AMENDED BY SECTION 1(b) AND 2(c),  
 PUB. L. 93-502, 93D CONG., 2D SESS., 88 STAT. 1561,  
 1564]. PUBLIC INFORMATION; AGENCY RULES,  
 OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS

(a) Each agency shall make available to the public  
 information as follows:

\* \* \* \* \*

(2) Each agency, in accordance with pub-  
 lished rules, shall make available for public in-  
 spection and copying—(A) final opinions, in-  
 cluding concurring and dissenting opinions, as  
 well as orders, made in the adjudication of  
 cases; (B) those statements of policy and  
 interpretations which have been adopted by the  
 agency and are not published in the Federal  
 Register; \* \* \*

\* \* \* \* \*

(3) Except with respect to the records made  
 available under paragraphs (1) and (2) of this  
 subsection, each agency, upon any request for  
 records which (A) reasonably describes such  
 records and (B) is made in accordance with  
 published rules stating the time, place, fees (if  
 any), and procedures to be followed, shall make  
 the records promptly available to any person.

\* \* \* \* \*

(b) This section does not apply to matters that  
 are—

\* \* \* \* \*

(3) specifically exempted from disclosure by  
 statute;

\* \* \* \* \*

(30A)

Any reasonably segregable portion of a record shall  
 be provided to any person requesting such record  
 after deletion of the portions which are exempt under  
 this subsection.

\* \* \* \* \*

INTERNAL REVENUE CODE OF 1954, AS AMENDED (26  
 U.S.C.):

SECTION 6103. PUBLICITY OF RETURNS AND DIS-  
 CLOSURE OF INFORMATION AS TO PERSONS FIL-  
 ING INCOME TAX RETURNS

(a) *Public record and inspection—*

(1) Returns made with respect to taxes im-  
 posed by chapters 1, 2, 3, and 6 upon which the  
 tax has been determined by the Secretary or  
 his delegate shall constitute public records; but,  
 except as hereinafter provided in this section,  
 they shall be open to inspection only upon order  
 of the President and under rules and regula-  
 tions prescribed by the Secretary or his dele-  
 gate and approved by the President.

(2) All returns made with respect to the taxes  
 imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32,  
 subchapters B and C of chapter 33, subchapter  
 B of chapter 37 and chapter 41, shall constitute  
 public records and shall be open to public ex-  
 amination and inspection to such extent as shall  
 be authorized in rules and regulations promul-  
 gated by the President.

(3) Whenever a return is open to the inspec-  
 tion of any person, a certified copy thereof  
 shall, upon request, be furnished to such per-  
 son under rules and regulations prescribed by  
 the Secretary or his delegate. The Secretary or  
 his delegate may prescribe a reasonable fee for  
 furnishing such copy.

TREASURY REGULATIONS ON PROCEDURE AND  
ADMINISTRATION (26 C.F.R.):

§ 301.6103(a)-1. *Inspection of returns by certain classes of persons and State and Federal government establishments pursuant to Executive order.* (a) *In general*—(1) *Authority.* The President is authorized by subsection (a) of section 6103 to open to public examination and inspection returns in respect of the taxes described in paragraphs (1) and (2) of such subsection. In addition, section 6106 provides that returns in respect of the tax described therein (unemployment tax imposed by chapter 23 of the Code) shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns of the taxes described in section 6103, except that subsections (a)(2) and (b)(2) of section 6103, and subsection (a)(2) of section 7213 (relating to unauthorized disclosure of information) shall not apply.

\* \* \* \* \*

(3) *Terms used*—(i) *Return.* For purposes of section 6103(a), the term “return” includes—  
(a) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and (b) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (a) of this subdivision. \* \* \*



No. 75-679

Supreme Court, U. S.

FILED

DEC 15 1975

MICHAEL RODAK, JR., CLERK

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1975

INTERNAL REVENUE SERVICE,

*Petitioner,*

vs.

FRUEHAUF CORPORATION, ET AL.,

*Respondents.*

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT  
OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SIXTH CIRCUIT**

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**In the  
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---

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT  
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---

**RESTATED QUESTION PRESENTED**

Exemption 3 of the Freedom of Information Act bars disclosure of "matters that are \* \* \* specifically exempted from disclosure by statute." The question presented is whether certain categories of documents such as Internal Revenue Service technical advice memoranda, private letter rulings, and other related files, which contain agency interpretations of the federal manufacturers excise tax law, are excluded from the meaning of the term "return" under 26 U.S.C. 6103, thereby not exempting such documents from disclosure under 5 U.S.C. 552(b)(3).

It has been necessary to restate the question presented since the question as stated by Petitioner was not con-

sidered by either of the lower courts. It does not take into consideration the provisions in the lower court orders for the *in camera* inspection and deletion of privileged and exempt information. Petitioner's question states that private letter rulings and technical advice memoranda as a category are exempt from disclosure because they contain return information. However, the Court of Appeals held that these categories of documents were not returns and to the extent that they might contain exempt information they were subject to *in camera* inspection and deletion prior to disclosure (Appendix A, pp. App. 9-10). Furthermore, the question presented by Petitioner begs the question since it assumes that Section 6103 precludes public disclosure of all documents containing any information which might be included in a federal tax return.

### STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Freedom of Information Act, 5 U.S.C. 552; Section 6103 of the Internal Revenue Code of 1954 (26 U.S.C.); and Treasury Regulations on Procedure and Administration, Section 301.6103(a)-1, are set forth in Appendix C.

### STATEMENT

At the time this action was commenced, Respondents were defendants in a criminal prosecution in the United States District Court for the Eastern District of Michigan.<sup>1</sup>

<sup>1</sup> Subsequent to the trial of the criminal case, Respondents obtained from the Treasury Department, as a result of an unopposed Freedom of Information Act request, documents which established that the Government had improperly used a repealed Treasury regulation during trial. Based on this newly discovered information, Respondents have filed a post trial motion for a new trial which the district court has taken under advisement.

In substance, a one count indictment charged that Respondents, over a nine year period from October of 1956 to December of 1965, had conspired to illegally lower the excise tax base on their products, which resulted in the payment of \$96,000,000 in taxes as against \$108,000,000 alleged to be due and owing.

On October 11, 1972, Respondents, as defendants in said criminal action, in order to obtain information vital to their defense, filed a Motion for Discovery and Inspection and a Motion for Discovery of Exculpatory Information.

In his Memorandum and Orders, dated June 21, 1973, the Honorable Thomas P. Thornton, United States District Judge, presiding, wrote as follows:

In the Defendants' Motion for Disclosure of Exculpatory Information the Defendants have made a request similar to that contained in paragraph 6 of their Motion for Discovery and Inspection. *In its response the Government concedes that* under Sec. 552(a)(3) of the 5 USC (The Freedom of Information Act) the Internal Revenue Service records (except privileged or confidential trade secrets and commercial or financial information obtained from a taxpayer) are available to any person under proper request for identifiable records, and refers Defendants to 26 CFR, Sec. 601.702(c). (Emphasis added.) Appendix B, pp. App. 17.)

Promptly thereafter, on June 26, 1973, Respondents, in reliance upon the representations made by counsel for the government, submitted a written request to the Petitioner to inspect and copy certain excise tax information and documents as provided for in the Freedom of Information Act, hereinafter referred to as FOIA, 5 U.S.C. §552 (Appendix C, pp. App. 20).

Nearly one month later, on July 24, 1973, the Petitioner denied Respondents' request *in toto*. Just six days later, on July 30, 1973, Respondents appealed the July 24, 1973 denial to Donald C. Alexander, Commissioner of Internal

Revenue. Some three weeks later, on August 22, 1973, Respondents' appeal was denied.

On September 14, 1973, the present action was filed wherein Respondents sought disclosure from Petitioner of certain private letter rulings,<sup>2</sup> technical advice memoranda, underlying correspondence and files, and index cards for the period from January 1, 1947, to September

<sup>2</sup> The private letter rulings which are the principal subject of this litigation, are interpretations of the manufacturers excise tax law and regulations and have been issued pursuant to specific sets of facts presented to the Petitioner by taxpayers. In answer to Plaintiffs' Request for Admissions, Petitioner has admitted the following facts:

1. Letter rulings are either "reference" or "routine".
2. Routine rulings files of the Excise Tax Branch, Office of the Assistant Commissioner (Technical), for the years prior to and including 1967, have been destroyed. However, certain files for the years 1959 through 1963 have been preserved because of pending litigation.
3. The function of a private letter ruling is to advise the requesting taxpayer regarding the excise tax treatment which it may expect from Petitioner in the circumstances specified in the ruling.
4. Prior to 1967, private letter rulings were designated as "precedent" or "non-precedent". In 1967, the year the FOIA was enacted, the names of the rulings were changed to "reference" and "routine" respectively.
5. An Index Digest Card file is maintained and refers to those private letter rulings files that have been classified as "reference".
6. Certain excise tax letter rulings are classified as "reference" and digested in the Index Digest Card files, by subject matter but not by Internal Revenue Code section.
7. The employees of Petitioner who prepare the private letter rulings are called Tax Law Specialists. They use, read and refer to previously issued private letter rulings, as well as the Index Digest Card files, in connection with their work of preparing private letter rulings.

13, 1973, in connection with its determinations that certain articles were subject to the manufacturers excise tax and its determinations of the price of these articles under Section 4216 of the Internal Revenue Code (Appendix D, pp. App. 25-30).

The Respondents immediately moved for a preliminary injunction against Petitioner. The Petitioner, in turn, moved for a summary judgment claiming that all of the requested documents were exempt from disclosure under Exemption 3 of the FOIA, 5 U.S.C. § 552(b) (3), as "matters that are specifically exempted from disclosure by statute." In substance, Petitioner argued that Sections 6103 and 7213 of the Internal Revenue Code of 1954, which, by their express language apply to returns and income tax returns respectively, exempt "All documents relating to

(footnote continued)

8. These employees are responsible for determining which of the private letter rulings are to be classified as "reference" or as "routine".
9. All of the private letter rulings, irrespective of their classification, are included in chronologic files, beginning in July, 1953. These files are not indexed by subject matter or Internal Revenue Code section; however, Petitioner maintains sets of cards in alphabetical order that separately refer to all such files by taxpayer name and date. These cards are maintained, beginning in 1954, in sets of approximately five-year blocks.
10. Petitioner, since 1954, has issued approximately 10,000 so-called "reference" rulings and approximately 30,000 "routine" rulings in the area of federal manufacturers excise tax, but Petitioner has selected, on the average, fewer than 175 of these rulings annually for publication in the Internal Revenue Bulletin.
11. A principal purpose of the ruling process is to achieve uniform interpretation and application of the federal tax laws.
12. Petitioner does not publish or otherwise make available to the public any of the "reference" or "routine" private letter rulings.



the enforcement of the federal revenue laws against specific taxpayers." (Emphasis added.)

The district court heard arguments on Petitioner's motion for summary judgment and subsequently a trial ensued. At the trial the Petitioner called only one witness and presented no evidence in support of its contention that any or all of the documents requested were returns or part of returns within the meaning of Section 6103.

On January 11, 1974, the district court denied the Petitioner's motion for summary judgment and ruled that Respondents were entitled to disclosure of all of the documents requested (Appendix E, App. 31-35).

Petitioner continued to argue in the court of appeals that Sections 6103 and 7213 immunized all documents associated with the administration of the tax laws. The court of appeals rejected this argument (Appendix A, pp. App. 48), holding that it was the intent of Congress that issues of construction of the FOIA be resolved in favor of public disclosure (Appendix A, App. 5). The court of appeals properly recognized that the Act places the burden on the Petitioner to show that nondisclosure is permitted under one of the nine specifically enumerated exemptions and that the Petitioner had not met this burden (Appendix A, pp. App. 5, 7). The court held that letter rulings and technical advice memoranda were not "returns" within the meaning of Section 6103, stating it was in agreement with the rationale of the Court of Appeals for the District of Columbia in *Tax Analysts & Advocates v. Internal Revenue Service*, 505 F.2d 350 (D.C. Cir., 1974). The court of appeals further held that none of the exceptions in the FOIA is applicable to the extent that it bars disclosure of the requested documents as a class or group (Appendix A, p. App. 7). To the extent that particular documents might contain exempt information they would be subject to *in camera* inspection and deletion by the district court (Appendix A, p. App. 10).

## REASONS FOR DENYING THE WRIT

Respondents emphasize that this case concerns only documents relating to the interpretation of the manufacturers excise tax law and *not* income tax law. Thus, any inquiry concerning Congressional intent regarding the privacy of information must be viewed in the light of the policies and purposes underlying the manufacturers excise tax.

It is difficult to imagine the dire consequences to our self-reporting tax system which the Petitioner predicts if it is required to make available to Respondents the requested information.<sup>3</sup> Certainly, the purpose of the non-disclosure provisions of Section 6103 as Petitioner points out, is to maintain taxpayer compliance, i.e., to encourage taxpayers fully and accurately to report all taxable transactions. The purpose, as this Court held in *Boske v. Comin-gore*, 177 U.S. 459, 470 (1900), is to protect "(t)he interests of persons *compelled*, under the revenue laws, to furnish information. . . ." (Emphasis added.)

It is not the purpose of Section 6103 to prevent the public from learning of a body of secret law, (i.e., the government's interpretation of the tax laws made known to only a select few) which gives a competitive advantage to one taxpayer over another. At the outset, it must be pointed out that the unique manner in which excise tax liability is determined has encouraged the development of just such

---

<sup>3</sup> Apparently even Petitioner does not take this argument too seriously, since it has proposed legislation to Congress which would permit the disclosure of private letter rulings to the public. (Appendix F).

a body of secret law. Without payment of a proposed *income tax* deficiency, a taxpayer may litigate the issue in the United States Tax Court, which has no jurisdiction over manufacturers excise taxes. On the other hand, the federal tax laws require a taxpayer against whom an *excise tax* deficiency is charged to pay a tax before undertaking refund litigation in the court of claims or the district court. Consequently, comparatively few excise tax cases are litigated. Taxpayers subject to the manufacturers excise tax generally seek advice on proposed excise tax transactions by requesting private letter rulings from the Petitioner. As a result, taxpayers involved with excise tax do not have a body of interpretative law comparable to that which has accumulated through income, estate and gift tax litigation in the United States Tax Court. Private letter rulings and technical advice memoranda have become essential sources of interpretation of the excise tax law.

Petitioner claims that it was the intent of Congress to allow government agencies to apply "their statutes" to protect documents in their custody. It is clear that Congress gave no such "blank check" to each agency so that it could insulate itself from the provisions of the FOIA whenever it chose.

Exemption 3 does not state "except as specifically provided by the agency" (viz., the Petitioner), but very clearly provides "as specifically exempted from disclosure by statute." *There is no statute (including the Internal Revenue Code) which specifically bars the disclosure of excise tax private letter rulings, technical advice memoranda or underlying documents.* It is the Petitioner which is attempting to broaden the scope of the specific statutory language of Exemption 3 to suit its own purposes. Such action attempts to circumvent the clear mandate of the FOIA.

While this Court has recently recognized that Exemption 3 of the FOIA contains no "built-in" standard as is the case with the other exemptions of the FOIA, the exemptions nevertheless represent the *congressional judgment* as to whether certain information in the executive branch must be kept confidential. *Administrator, Federal Aviation Administration v. Robertson*, 43 U.S.L.W. 4833, (U.S. June 24, 1975). In that case, pursuant to specific congressional legislation, 49 U.S.C. § 1504, upon written objection by any affected person, the Administrator was granted discretion to withhold information from public disclosure which in his judgment would adversely affect the interests of that person and which was not required in the interest of the public. Section 6103 does not give to the President, the Secretary of the Treasury or the Petitioner any discretion to decide what information may be withheld from public disclosure. Congress has provided that returns and only returns are not subject to public disclosure without prior approval. Nor does the statute give the President, the Secretary or the Petitioner the discretion or power to define "return" in such a way as to insulate all information in the files of Petitioner from disclosure.

This Court has stated in *Administrator, supra* that it was the clear intention of Congress that all of the 100 exemption statutes (including Section 6103) in effect at the time of the enactment of the FOIA should remain unaffected by the new Act.

As shown by the legislative history of Section 6103, Congress did not intend that Petitioner should be permitted to expand the term "return" to encompass the documents which are the subject matter of this action. The predecessors of Section 6103 date back almost 66 years.



The Act of August 5, 1909, ch. 6, § 38, 36 Stat. 11, in language similar to the current Section 6103, while designating returns filed thereunder to be public records, contained nondisclosure provisions making it unlawful to divulge information contained "in returns", except upon the special direction of the President, and imposed penalties similar to those contained in the current Section 7213, which is applicable only to *income* tax returns. Similarly, the Act of June 17, 1910, ch. 297, § 1, 36 Stat. 468, provided that tax "returns" filed pursuant to the corporation tax statute enacted in 1909 should be "open to inspection only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President."

The Income Tax Act of 1913, the first income tax law enacted following ratification of the Sixteenth Amendment to the Constitution, also provided that tax returns made under the Act should be "open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President." Income Tax Act of 1913, ch. 16, § 11G(d), 38 Stat. 114. Subsequent to the enactment of the Income Tax Act of 1913, the language of the nondisclosure provisions in the federal revenue laws has remained relatively unchanged. Thus, the meaning of the term "return" must be determined from what Congress understood that term to encompass at the time of these early revenue acts.

In 1913, Congress could not have considered the term "return" to include private letter rulings, since the Petitioner's rulings program, as presently constituted, is barely 30 years old. Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 N.Y.U. Institute on Federal Taxation 1, 2 (1962). As

the former Commissioner of Internal Revenue points out, even an informal rulings program, which consisted of answers to taxpayers' questions, did not arise until after the enactment of the Income Tax Act of 1913.

Nothing in the case of *Boske v. Comingore*, 177 U.S. 459 (1900), which predates the first predecessor of Section 6103 by almost nine years, supports the Petitioner's position that all documents containing "return information" are exempt from general disclosure by virtue of Section 6103. In that case, a U.S. Internal Revenue collector had been imprisoned "for refusal to file with his deposition taken by the State of Kentucky, copies of certain reports made to him by Block & Sons, distillers. . . ." During his deposition the collector stated that the distiller had "made monthly reports to his office of liquors manufactured by them and deposited in bonded warehouses."

This Court correctly held that such reports should not be released by the collector. They contained commercial and financial data of a taxpayer which continue to be confidential and exempt from disclosure under Exemption 4 of the FOIA and the order appealed from. It will also be noted that those reports were demanded by the State of Kentucky. Today, Congress, by statute, has provided for the disclosure of tax return information to the various state revenue departments. 26 U.S.C. 6103(b).

Favorable private letter rulings, especially excise tax rulings, generally have the effect of reducing tax revenue and result in tax benefits to those who receive them. In many respects, a revenue ruling is similar to a court decision in which the taxpayer seeks a benefit and obtains an adjudication. Court decisions are public and recite facts, including confidential information where necessary to the decision. The taxpayer who invokes the court's



jurisdiction to get his liability reduced is not discouraged from doing so by the disclosures he necessarily makes. This is the price he pays—and gladly—for the chance at a tax reduction. The nondisclosure requirements of Section 6103 were never intended to apply to the interpretations of law resulting from the rulings process.

In spite of the announced purpose of the Petitioner to achieving uniform application of the tax law by the use of revenue rulings,<sup>4</sup> in many cases those who receive a favorable private letter ruling or technical advice memoranda are receiving favored tax treatment from the Petitioner, resulting in disparity in the application of the tax law. *International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl., 1965) *cert. den.* 382 U.S. 1028 (1966). In that case, the Petitioner issued a favorable private letter ruling to a competitor of I.B.M., exempting it from the manufacturers excise tax on computers manufactured by it. When I.B.M. learned of this, it also sought an exemption for similar computers manufactured by it. The Petitioner issued an unfavorable ruling to I.B.M. and revoked the prior favorable ruling issued to its competitor. As to the competitor, application of the ruling was made *prospective* only. The court of claims held that I.B.M.'s competitor had been unduly favored in the promulgation of this ruling, and that I.B.M. could recover taxes paid by it.

In support of its holding, the court quoted with approval Mr. Justice Frankfurter's view as to disparity of treatment by the Petitioner:

The Commissioner cannot tax one and not tax another without some rational basis for the difference. *United States v. Kaiser*, 363 U.S. 299, 308 (1960).

<sup>4</sup> See fn. 2, *supra*.

In addition, at least in the area of *excise* tax, Congress intended that private letter rulings would not only be disclosed to parties other than those to whom the rulings were issued, but also that these parties could rely on such rulings. Section 1108(b) of the Revenue Act of 1926, *which is still in effect*, provides:

No tax shall be levied, assessed or collected . . . on any articles sold or leased by the manufacturer, . . . if at the time of the sale or lease there was an existing ruling, regulation, or Treasury decision holding that the sale or lease of such article was not taxable, and the manufacturer . . . parted with the possession of such article, *relying upon the ruling, regulation or Treasury decision.* (Emphasis added.)

As can be seen, in order to obtain the benefit of this statute, all that is required is that the ruling or regulation or Treasury decision be in existence and that the manufacturer rely thereon. The ruling need not have been issued to the manufacturer. There is no comparable *income tax* provision. This section was enacted together with an income tax nondisclosure provision (Section 3167) which is the predecessor of Section 7213 of the Internal Revenue Code of 1954. Thus, it appears that Congress felt that equality of treatment with regard to the levy and enforcement of the *excise* tax laws outweighed considerations of confidentiality. As stated by the court of claims in *International Business Machines Corp. v. United States*, *supra*:

For all tax rulings, it is important that there be like treatment to those who should be dealt with on the same basis. *Automobile Club of Michigan v. Commissioner*, *supra*, 353 U.S. at 186, and other cases cited *supra* at page 920 of 343 F.2d. Parity in the levying of manufacturer's excises is peculiarly essential to free and fair competition. See *Exchange Parts Co. v. U.S.*, *supra*, 279 F.2d at 253, 150 Ct. Cl. at 541, H. Rept. No. 708, 72d Cong. 1st Session, pp. 31, 32 (1932).

Petitioner, at page 10 of its Petition, asserts that there is a congressional policy "against disclosure of Internal Revenue Service information relating to the *liability* of a particular taxpayer." If Petitioner would confine its argument to commercial and financial information exempt under 5 U.S.C. 552(b)(4), Respondents would agree to the privileged and confidential nature of such information. Respondents are not requesting information relating to the liability of a particular taxpayer, but only those documents in the files of the Petitioner concerning the interpretation of the excise tax law. This information has heretofore been kept secret and is not available to the public from any other source. As the lower courts have recognized, there is an infinite difference between disclosing "the law" and disclosing commercial and financial information contained in a tax return. Furthermore, the FOIA provides that "an agency may delete identifying details." 5 U.S.C. 552(a)(2)(C) (Appendix C, pp. App. 20.)

As it did in both lower courts, Petitioner, at page 10, takes the position (which the lower courts rejected) that "the private character of the information in a tax return is not altered for purposes of Section 6103 because it is also recorded on other documents as part of the process of determining tax liability." It is difficult to believe that Petitioner is serious about such a far-reaching statement. There are many documents filed with various governmental agencies which contain information that is also included in federal tax returns. These documents contain information relating to gross income, expenses, assets and liabilities of taxpayers, which has also been reported to the Petitioner in tax returns. For example, certain pension and profit sharing plan information is filed with the Department of Labor. Statistical information, reported in federal tax returns, must be filed with the Securities and

Exchange Commission. Is the Petitioner contending that such agencies are not required to disclose the documents involved because, in its words, they contain information included in federal tax returns? Respondents would hope not. Such a premise would make a mockery of the FOIA and of the longstanding statutes, rules and regulations permitting their disclosure.

A Quarterly Federal Excise Tax Return, Form 720 (Appendix G, pp. App. 37), is an extremely simple form. It consists of only one page and involves only three simple steps, viz.—(1) total the gross amounts of various excise taxes reported, (2) add or subtract adjustments to arrive at excise tax as adjusted, and (3) subtract excise tax deposits made for the quarter to arrive at excise tax due. There are no estimated returns for manufacturers excise taxes. There are no separately printed schedules for attachment to Form 720.

On the other hand, a private letter ruling is:

A written statement issued to a taxpayer or his authorized representative by the national office which *interprets and applies the tax laws* to a specific set of Facts. Treas. Reg. §601.201(a)(2). (Emphasis added.)

See also *Tax Analysts & Advocates v. Internal Revenue Service*, 505 F. 2d 850, 852 (D.C. Cir. 1974).

The courts of appeal for both the District of Columbia and the Sixth Circuit observed:

Letter rulings are issued at the request of taxpayers seeking advice as to the tax consequences of specific transactions. This information provides guidance in planning and conducting their business affairs and, if the transaction is consummated, aids in preparation of their tax returns. The fact that taxpayers may elect to follow the Internal Revenue Service's recom-



mendations that letter rulings be attached to returns containing information about the transactions referred to in the letter rulings does not *deprive a letter ruling of its separate status as a "final opinion" and "interpretation" nor does it make the attachment part of a return.* Attachment is to alert the District Director of the Internal Revenue Service that a letter ruling had been issued. The appropriate District Director of the Internal Revenue Service is always sent a copy at the time a letter ruling is issued to any taxpayer required to file a return in his district. 505 F. 2d at 351-355. (Appendix A, p. App. 8.)

The Internal Revenue Service Manual defines technical advice as:

(T)echnical advice means advice or guidance as to the interpretation and proper application of Internal Revenue laws, related statutes, and regulations, to a specific set of facts, furnished by the National Office upon the request of a district office in connection with the examination of a taxpayer's return or consideration of a taxpayer's return or claims for refund or credit. It is furnished as a means of assisting Service personnel in closing cases and establishing and maintaining consistent holdings in the several districts. It does not include memoranda on the matter of general technical application furnished to district offices where the issues are not raised in connection with the examination of the return of a specific taxpayer. I.R.S., Statement of Procedural Rules, Treas. Reg. § 601.105 (b)(5)(i) (1973).

From this definition it can be seen that technical advice, for all practical purposes, is the same as a private letter ruling. It is, in effect, an interpretation of the Internal Revenue law based upon a given set of facts. From this standpoint, it is nothing more than a private letter ruling which is issued after a tax return has been filed.

In practice, it is usually the taxpayer who requests the technical advice. The Petitioner recognizes this in its Statement of Procedural Rules:

(W)hile the case is under the jurisdiction of the district director, a taxpayer or his representative may request that an issue be referred to the National Office for technical advice on the grounds that a lack of uniformity exists as to the disposition of the issue, or that the issue is so unusual or complex as to warrant consideration by the National Office. Treas. Reg. § 601.105(b)(5)(iii)(a) (1973).

The Petitioner contends that technical advice memoranda should be exempt from disclosure because they are similar to an Internal Revenue agent's audit report. Such is not the case. A true "audit report" is a report made by an Internal Revenue agent at the conclusion of his examination of a taxpayer's tax return as well as its records, books, invoices, etc. It contains financial information of the taxpayer and the agent's determination of a proposed tax deficiency or overassessment. Conversely, a technical advice memorandum is issued by the Petitioner, usually at the request of a taxpayer who is seeking an interpretation of the tax law which may remain unknown to other taxpayers. It usually involves a single issue of law. The taxpayer's portion of the memorandum is almost always based on a narrow set of facts and rarely, if ever, contains financial information or trade secrets. There is no compulsion for any taxpayer to request technical advice and no statutory requirement that Petitioner issue any.

Petitioner refers to Section 301.6103(a)-1(a)(3) of Internal Revenue Regulations (26 C.F.R.) defining the term "return" as though it had the force of law. It does not. The broad language of the quoted regulation dates only



from February 18, 1972, and Congress has not reenacted Section 6103 since that date. In 1961, the Petitioner, in Treasury decision 6543, promulgated Treasury Regulation Sec. 301.6103(a)-1. 1961-1 Cum. Bull. 671. Included in this Regulation was the following definition of "return":

(3) Terms used — (i) Return — For purposes of Section 6103 (a), the term 'return' includes information returns, schedules, lists, and other written statements filed with the Internal Revenue Service *which are designed to be supplemental to or to become a part of the return*, and, in the discretion of the Secretary or the Commissioner or the delegate of either, *other records or reports containing information included or required by statute to be included in the return. . . .* (Emphasis added.)

This definition of "return" was carried forward substantially unchanged until February 18, 1972, when the definition as stated in the present Regulation, §301.6103(a)-1(a)(3), was promulgated by Treasury Decision 7162. 1972-1 Cum. Bull. 382. As can be seen, for eleven years, the Petitioner did not consider the term "return" to include "all documents related to the levy and collection of federal taxes" as it now contends. Only those information returns, lists, schedules and written statements which were "designed to be supplemental to or to become part of a return" constituted a "return" when the FOIA was enacted in 1966. Under *Administrator, supra*, these would be the only exempt items that Congress intended to remain unaffected by the Act.

Treasury decision 7162 declared that it was designed "to clarify the definition of the term 'return' under Section 6103 of the Internal Revenue Code of 1954." It does more than merely remove the discretionary powers of the Commissioner as contended by Petitioner. The list of

types of information in subsection (b) is obviously intended to be more encompassing than the limits intended by Congress. Moreover, the limitation contained in the prior regulation that the information "included or required by statute to be included in the return" was deleted. These extensive changes cannot be deemed a mere clarification.

In summary, Reg. 301.6103(a)-1(a)(3), insofar as it defines "return", exceeds the bounds of Section 6103 of the Internal Revenue Code of 1954, and as such is a nullity. *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936). See also Randolph Paul, *Studies in Federal Taxation*, (Third Series) 435 (1940): "if the Regulation definitely goes beyond the limits of the statute, no amount of legislative reenactment will validate the ruling." In the present case, the regulation obviously goes beyond the limit of the statute.

At Page 11 of the Petition it is asserted that by enacting Exemption 3 of the FOIA "Congress intended to protect all groups of documents to which the agencies had applied their nondisclosure statutes." This is not true. Senate Report No. 813, dated October 4, 1965, which accompanied Senate Bill 1160 (the FOIA) states on page 3:

After it became apparent that Sec. 3 of the Administrative Procedure Act was being used as an excuse for secrecy, proposals for change began.

*It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. . . .* (Emphasis added.) S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

Petitioner claims that disclosure of the requested documents is prohibited by Exemption 3, which provides that

all matter "specifically exempted from disclosure by statute" shall not be disclosed. This exemption, as are all of the exemptions, is expressly limited by Subsection (c) of the FOIA, which provides:

This section does not authorize withholding of information or limit the availability of records to the public except as *specifically* stated in this section. . . (Emphasis added.) 5 U.S.C. § 552(c).

The Senate Report at page 10 states:

The purpose of this subsection is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (e). S. Rep. 813, 89th Cong., 1st Sess. (1965).

The House Report is almost identical. H. Rep. No. 1497, 89th Cong., 2d Sess.

Respondents submit that Congressional intent under the FOIA is to protect the public by requiring full disclosure of the secret law accommodated in private letter rulings and technical advice memoranda. As the Senate Report, *supra*, states, "it is not for the agency to tell the public what documents it will disclose but rather to establish a general philosophy of full agency disclosure unless information is exempted under *clearly* delineated statutory language."

As repeatedly stated by Respondents, they do not seek disclosures of excise tax returns. They are seeking interpretations of the excise tax law as contained in excise tax private letter rulings and technical advice memoranda issued by Petitioner. The fact that these interpretations of law may contain some information which might be

exempt under Section 6103 would not justify a categorical bar to their disclosure.

The FOIA protects against the unwarranted invasion of the personal privacy of the public by providing that:

. . . to the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available for publication an opinion, statement of policy, interpretation, or staff manual or instruction. 5 U.S.C. § 552 (a)(2)(C).

In the case of exemptions under the FOIA, including Exemption 3, Congress has recently given guidance in providing a workable formula whereby the interests of both the government and the public can be protected. The last sentence of Section 552(b) of the FOIA, as amended November 21, 1974, provides:

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. 5 U.S.C. 552 (as amended by Section 1(b) and 2(c), Pub. L. 93-503, 93D Cong., 20 Sess., 88 Stat. 1561, 1564).

In summary, interpretations of the law are clearly not tax returns. To the extent that such interpretations may contain exempt information such information should be deleted and the remainder should be disclosed as Congress clearly intended. Respondents are required by the FOIA to pay fees for searching, examining and producing the documents furnished. They have made such payments and continue to be willing to do so. The fact that difficult questions of judgment on the part of the Petitioner may be involved in complying with the FOIA is not sufficient reason to deny disclosure.

**CONCLUSION**

It is requested that the Court support the clear Congressional intent as well as the decisions of the lower courts and deny the Petition for Writ of Certiorari filed by the Petitioner.

Respectfully submitted,

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Dated: December 12, 1975.

# APPENDIX



**APPENDIX A**

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No. 74-1474

**UNITED STATES COURT OF APPEALS**  
**For the Sixth Circuit**

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FRUEHAUF CORPORATION, WILLIAM E. GRACE and ROBERT  
D. ROWAN,

*Plaintiffs-Appellees,*

v.

INTERNAL REVENUE SERVICE,

*Defendant-Appellant.*

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On Appeal from the United States District Court for the  
Eastern District of Michigan.

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Decided and Filed June 9, 1975.

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Before: MILLER, LIVELY and ENGEL, Circuit Judges.

ENGEL, Circuit Judge. In this action brought by plaintiffs under the Freedom of Information Act, 5 U.S.C. § 552, (F.O.I.A.), the Internal Revenue Service appeals from an order of the district court requiring that agency to make available for inspection and copying a large number of documents in the possession of the Excise Tax Branch of the Miscellaneous and Special Provisions Tax Division of the Office of Assistant Commissioner (Technical). The documents ordered to be produced consist primarily of unpublished private and letter rulings relating to the manufacturers excise tax as imposed upon sales of trucks and trailers, but also include the files underlying twenty-three published Revenue Rulings, communications between the Service and persons outside the Executive Branch, and

## App. 2

indices and card files relating to the foregoing. The complete list of documents is described in the court's order, which is attached hereto as Appendix A.

The information sought does not pertain to the federal income tax, but is confined to interpretations of the manufacturers excise tax under Section 4061(a) of the Internal Revenue Code, 26 U.S.C. §4061(a), and the definition of the price for which an article is sold as set forth in Section 4216.

The order appealed from specifically provides that the described documents shall be made available intact and without deletion,

"except for those items which, . . . defendants submits to the court . . . sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the court . . ., as to whether the proposed deletions are justified under the Freedom of Information Act together with a detailed written explanation of the justification for each deletion . . ."

The government opposed disclosure below, claiming that the documents requested were exempt under one of the nine exemptions to the Act, § 552(b) (3), which provides that the Act is not applicable to matters "specifically exempted from disclosure by statute". The Service urges that, as described in the district court's order, the documents are exempt under the Internal Revenue Code, 26 U.S.C. §§ 6103, 7213. Section 6103 provides in part, that

" . . . All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, and subchapter B, chapter 37, and chapter 41, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President."  
26 U.S.C. § 6103(a) (2)

## App. 3

Section 7213 provides for criminal penalties for disclosure by government employees of certain information, including income returns, sources of income and profits.<sup>1</sup>

<sup>1</sup> 26 U.S.C. § 7213, Unauthorized disclosure of information. Subsection (a) (1) provides:

(a) *Income Returns.*—

(1) *Federal employees and other persons.*—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

Subsection (b) provides:

(b) *Disclosure of Operations of Manufacturer or Producer.*

—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment.

The government further asserts that the district court had and should have exercised equitable discretion to withhold the relief even if it were otherwise called for under the Act.

We reject both of these contentions and affirm the judgment of the district court. We hold that while the district court erred in construing 26 U.S.C. § 6103 as extending the protection of privacy to persons filing income tax returns only, its order for disclosure was nonetheless proper when construed to reserve in the court the right, upon *in camera* inspection, to deny disclosure of any specific documents in which the deletion of protected matter will not suffice to preserve any exemption which may be validly asserted with respect thereto.

We also reject the appellants' argument that "even assuming, *arguendo*, that the documents in issue are not specifically exempt from disclosure by statute, . . . the district court erred in failing to exercise its equitable jurisdiction to decline to issue an order compelling disclosure".

It is important to understand at the outset what this appeal does not involve. First, no issue is raised that the documents sought, as numerous as they may be, are not "identifiable records" within the meaning of § 552(a) (3). Second, no constitutional question is presented. Third, no claim is made that *in camera* inspection by the trial court to sift out privileged matter is forbidden, as is classified matter under subsection (b) (1) of the Act, *EPA v. Mink*, 410 U.S. 73 (1969).

Finally, while the Act lists nine exemptions to which its provisions shall not apply, the Internal Revenue Service relies only upon that contained in subsection (b) (3), matters "specifically exempted from disclosure by statute".

As the Supreme Court pointed out in *EPA v. Mink*, *supra*, the F.O.I.A. was enacted in response to the shortcomings of its predecessor, Section 3, which "was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute". 410 U.S. at 79. While the Act may have its imperfections in drafting,<sup>2</sup> the intent of the Congress that issues of construction be resolved in favor of public disclosure is unmistakable, and our circuit as well as others, has consistently recognized this. *Tennessean Newspapers, Inc. v. Federal Housing Administration*, 464 F.2d 657 (6th Cir. 1972); *Hawkes v. I.R.S.*, 467 F.2d 787 (6th Cir. 1972); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

The Act places upon the agency the burden to impose specific objections to disclosure, and to show that non-disclosure is permitted under one of the nine specifically enumerated exemptions. *EPA v. Mink*, *supra*, at 79. The policy of the Act favors disclosure and thus mandates that the exemptions be construed narrowly. *Soucie v. David*, 448 F. 2d 1067 (D.C. Cir. 1971).

The government contends that the letter rulings and other materials sought constitute "returns" within the meaning of 26 U.S.C. § 6103, or are exempt as privileged material under 26 U.S.C. § 7213. It asserts that certain of the documents may be attached to an excise tax return or may involve information contained in a tax return, and claims broadly that it was the "obvious intent of Congress to restrict access to all documents associated with the administration of the tax laws".

<sup>2</sup> This is the position taken by Professor Kenneth Davis. See Davis, *Administrative Law Treatise* (1970 Supplement) at 115.



## App. 6

While an injunction has been issued and stayed pending appeal, neither the trial court nor this court has had the opportunity to examine the precise documents desired to determine whether they are subject to disclosure. We thus find ourselves in much the same position as we did in *Hawkes v. Internal Revenue Service*, 467 F. 2d 787 (6th Cir. 1972). In that case disclosure of certain portions of an Internal Revenue Manual by a taxpayer indicted for tax fraud was opposed on the assertion that disclosure was excluded under 5 U.S.C. § 552(b) (2), excluding matters "related solely to the internal personnel rules and practices of an agency". As Judge Celebrezze there observed:

"Neither this court nor the district court has examined the Manual portions sought. It is therefore impossible for us to state authoritatively which portions are subject to compulsory disclosure, although it would appear that several sections at least of the Manual would provide guidance as to the Service's understanding of substantive law and relevant procedures and would therefore be subject to disclosure under (a) (2) (C). *In camera* [italics in quoted text] inspection of the Manual would provide a basis for application of the guidelines for disclosure suggested in this opinion and a remand for such inspection and evaluation seems reasonable." *Hawkes v. I.R.S.*, *supra*, at p. 796.<sup>3</sup>

Formulated on the guidance of *Hawkes*, *supra*, the district court injunction permits submission to the court for *in camera* inspection of any documents in which the Service believes deletions are justified.

<sup>3</sup> *Hawkes* was remanded to the district court for *in camera* examination. Following such examination the district court concluded the materials were subject to disclosure and ordered the materials made available to plaintiff. This court affirmed that decision in *Hawkes v. I.R.S.*, 74-1190 (decided and filed December 23, 1974).

## App. 7

The position of the Service is broad rather than specific, perhaps in part because the order itself deals more in categories than in specifically identified documents. For this reason we conceive our role at this stage to be limited largely to determining whether the types of documents described are so clearly within the exemption of 26 U.S.C. §§ 6103 and 7213 and the injunctive order appealed from must be reversed and the suit under the Act dismissed. We determine that the Service has not maintained its burden of showing, at this stage, that the material requested is within the specific exemptions of the statutes relied upon so as to make reversal necessary.

The nature of certain of the documents sought, however, is known and can be ruled upon on a categorical basis. Letter rulings, as such, have a rather well defined meaning. The Secretary of the Treasury has defined a letter ruling as:

"A written statement issued to a taxpayer or his authorized representative by the national office which interprets and applies the tax laws to a specific set of facts." Treas. Reg. § 601.201(a) (2).

See also *Tax Analysts and Advocates v. I.R.S.*, 505 F. 2d 350, 352, (D.C. Cir. 1974).

We hold that letter rulings are not "returns" within the meaning of 26 U.S.C. § 6103 and hence are not exempt for that reason under § 552(b) (3) of the Act. We are in agreement with the rationale of the District of Columbia Circuit in *Tax Analysts and Advocates v. I.R.S.*, 505 F. 2d 350 (D.C. Cir. 1974), and with that of Professor Davis in his treatise, Davis, *Admin. Law Treatise*, (1970) § 3A.9 at 130. In *Tax Analysts*, *supra*, the court emphasized that such letter rulings are generated by the agency rather than the taxpayer. It further stated:

Letter rulings are issued at the request of taxpayers seeking advice as to the tax consequences of specific transactions. This information provides guidance in planning and conducting their business affairs and, if the transaction is consummated, aids in preparation of their tax returns. The fact that taxpayers may elect to follow the Internal Revenue Service's recommendations that letter rulings be attached to returns containing information about the transactions referred to in the letter rulings does not *deprive a letter ruling of its separate status as a "final opinion" and "interpretation" nor does it make the attachment part of a return.* Attachment is to alert the District Director of the Internal Revenue Service that a letter ruling had been issued. The appropriate District Director is always sent a copy at the time a letter ruling is issued to any taxpayer required to file a return in his district. 505 F. 2d at 354-355.

We also agree with the court in *Tax Analysts* that letter rulings are not rendered exempt by Treasury Regulation § 301.6103(a)-1 (a) (3) (Feb. 8, 1972), which amended the earlier definition of "return" and broadened it. While certain letter rulings may fall within the literal language of that regulation, we agree that the regulations, promulgated here by the regulated agency, "cannot immunize letter rulings from disclosure under the Freedom of Information Act", beyond that which Congress intended to protect under § 6103. 505 F. 2d at 354, n. 1.

The District of Columbia Circuit further ruled in *Tax Analysts* that, under §§ 6103 and 7213 of the Internal Revenue Code, technical advice memoranda written in conjunction with income tax returns were exempt from disclosure under § 552(b) (3). We do not reach that precise question here as the order here most carefully limits disclosure to "those portions of responses to Technical Ad-

vice requests that are or were intended for issuance to taxpayers". So limited, and with the retained power in the court to make necessary deletions, we think such portions do not come within the exemption of § 6103.

In his memorandum opinion, the district judge below observed:

"We consider that none of the nine exceptions has application to the material here sought by plaintiffs and that 26 U.S.C.A. § 6103 provides for the protection of the privacy of persons filing *Income Tax* returns. To the extent that any of the material sought by plaintiffs might constitute an invasion of the privacy of taxpayers, there are means that may be employed to avoid such disclosure. In furnishing plaintiffs the information relative to their defense there need be no violation of Section 6103 of Title 26 of the Internal Revenue Code." 369 F. Supp. at p. 110.

The quoted language is troublesome in two respects. First, we agree that probably none of the exceptions is applicable to the extent at least that it bars disclosure of the requested documents as a class or group. We do not read it as meaning, however, that a given specific document which is finally delivered over for *in camera* inspection may not contain material which is excludable as within one of the exempted categories. Indeed, so much seems to be recognized by the broad language of the order referring to "whether the proposed deletions are justified under the Freedom of Information Act." Second, it is apparent from an examination of the language of § 6103 that the district judge erred at least to the extent of holding that § 6103(a) (2) applies only to income tax returns. It does not, but rather expressly applies as well to taxes imposed under chapter 32, which of course relates to excise taxes. Since, therefore, the possibility remains that the exemp-



tion of § 6103 may be found to apply to a specific document which may be delivered over for *in camera* inspection, the district judge will wish to bear this in mind during inspection. This is particularly true with respect to any inspection of files applicable to the issuance of the enumerated Revenue Rulings under Section (2) of the order. The order as entered, however, appears to retain sufficient flexibility to permit this determination to be properly made by the trial court.

A further complaint of the Internal Revenue Service is that the district court's opinion made no mention of its claim that a further exemption from disclosure of the requested documents is created by the provisions of 26 U.S.C. § 7213(a) and (b). The government argues that "while concededly its specific terms do not encompass excise tax returns *per se*, logic dictates the conclusion that it applies to information submitted in connection with such returns."

Section 7213(a) quite expressly refers to *income* returns, both in its heading and repeatedly throughout the body of the text. Unlike Section 6103(a) (2), Section 7213(a) makes no reference to "chapter 32" or otherwise evinces an intent to include information regarding *excise* tax returns within its scope. Contrary to the assertion of the government, logic supports the more restricted meaning, especially since the section imposes criminal penalties. We have been shown no authority to the contrary.<sup>4</sup>

Section 7213(b) is more general in scope than (a) and is not geared to the return of any particular tax. It is direct-

<sup>4</sup> *Tax Analysts and Advocates v. I.R.S.*, *supra*, of course did not involve a dispute as to the applicability of § 7213 to excise taxes. That case involved documents related to income tax only.

ed toward precluding disclosure of certain types of information obtained by officers or employees as a consequence of a visit by such persons to any manufacturer or producer in the discharge of official duties. The order as framed does not reveal that any such type information is contained within the documents affected. However, if upon *in camera* inspection, material covered by § 7213(b) should appear, we believe the order of the district judge retains sufficient flexibility in the court to protect against its disclosure.

### EQUITABLE JURISDICTION ISSUE

The government contends that if the documents in issue are not specifically exempt from disclosure by statute, the district court nonetheless erred in declining to exercise its equitable discretion to refuse disclosure, relying upon certain language in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 20 (1974):

"With the express vesting of equitable jurisdiction in the district court by § 552(a) there is nothing to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court."<sup>5</sup>

The Service also relies upon the comments of Professor Davis in his *Administrative Law Treatise*:

"The equity practice is clear and strong. The court that has jurisdiction to enforce the information Act

<sup>5</sup> The Service relies upon *Renegotiation Board v. Bannerkraft*, 415 U.S. 1 (1974), as support for its claim that the power to grant equitable relief carries with it the power as well to deny it upon a showing of valid equitable considerations to the contrary. The case, however, involved the issue of whether equitable discretion could be employed to grant additional remedies and not whether the discretion would permit a withholding of relief under the Act.



also has jurisdiction to refuse to enforce it whenever equity traditions so require". (1970 Sup.), § 3A.6, at 124

Many of the arguments proffered by the government in support of its contention that relief should be withheld here are those which have been considered and rejected by Congress. Indeed, the government argues not that the "equities" or facts of this particular case necessitate non-disclosure, but that the categories of documents requested should, for general policy reasons, be exempt. We find these reasons inadequate in light of the clear intent of Congress favoring disclosure.

The legislative history to the Act reveals that Congress did not intend general notions such as "public interest" to shield information from the public:

Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—"requiring secrecy in the public interest", or "required for good cause to be held confidential".

It is the purpose of the present bill to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. Senate Rep. No. 813, 89th Cong., 1st Sess. at p. 3.

The Internal Revenue Service urges that its letter ruling program will be destroyed if the rulings are disclosed. In

addition to the fact that no proof of this appears on the record, this is an argument for the legislature, not the court.

As an alternative to an outright ban on all disclosures, the Service asks "that this court should at a minimum modify the district court order to preserve the confidentiality of documents and correspondence in the Internal Revenue Service's possession" primarily because, it urges, much of the information was submitted in the good faith belief that the documents would be kept confidential. In effect, the Service asks that any ruling which makes such documents generally disclosable should be prospective only, so that administrative procedures may be adopted to protect against unwarranted disclosure of confidential business information submitted by taxpayers and so that in the drafting of its rulings in the future, the Service can delete such confidential commercial and financial data as might otherwise have been incorporated in them.

We read this request as simply another way of saying that the plaintiffs should be denied the information they seek.<sup>6</sup> They did not come into court as champions of a cause, but as citizens seeking information to which they claim they were entitled under the Act.

The difficulty with the position of the Service is that it claims altogether too much protection from disclosure and offers altogether too little specific justification. This posi-

<sup>6</sup> The record does not contain a judicial finding that requests by taxpayers for letter rulings are in fact made upon the assurance that the rulings will be kept confidential. Indeed, the government admits that a small number of such rulings, after editing, are published each year by the I.R.S. The government does not state whether taxpayer consent is obtained. [Response to Request for Admissions, No. 14].

tion is not unlike that rejected by this court in *Tennessean Newspapers v. Federal Housing Administration*, *supra*, in which Judge Edwards observed that "such a view, carried to its logical conclusion, would allow the District Court to review a petition for disclosure totally independent of the Freedom of Information Act and its purposes and standards."<sup>7</sup> 464 F. 2d at 661. While our ruling in that case must necessarily be understood in the context of the practical and equitable considerations set forth in *EPA v. Mink*, *supra*, we do not conceive that the traditional equitable powers of the district court justify it or us in adding a tenth or eleventh exemption to the nine specifically enumerated in the Act, nor do we conceive that we may postpone the effective date of its operation.<sup>8</sup>

<sup>7</sup> In *Tennessean Newspapers v. Federal Housing Administration*, 464 F. 2d 657 (6th Cir. 1972), the district court had ordered disclosure of an appraisal, but permitted the withholding of the name of the appraiser. We reversed, holding that in the context of that case, the district court was without power to "vary the standards" established by the Act by permitting non-disclosure "absent the applicability of one of the specific exemptions".

<sup>8</sup> The Service cites *Evans v. Department of Transportation of the United States*, 446 F. 2d 821 (5th Cir. 1971), *cert. denied* 405 U.S. 918 (1972), as authority that courts should not permit disclosure of information submitted with the understanding that it would be kept confidential. The difference between *Evans* and the facts here is apparent. *Evans* dealt with a specific document submitted by a confidential informer with the express reservation that his identity would remain confidential. Such information was specifically exempted under 49 U.S.C. § 1504. Further, it was held that the information sought in that case was a part of an investigatory file compiled for law enforcement purposes within the meaning of subsection (b)(7) of the Act. No claim under that subsection has been made in these proceedings to date.

## CONCLUSION

In conclusion, we stress as we did in the first *Hawkes* case, 467 F. 2d 787, *supra*, that the merits of any claim of exemption of a particular document are not before us. See also *Renegotiation Board v. Bannerkraft Co.*, *supra*, at 26. Any such claims must yet be decided by the district court upon invocation of the *in camera* inspection provision in its order. We are satisfied that the order as entered contains sufficient flexibility for its implementation to permit the express purposes of the Act to be carried out in a manner consistent with equitable principles and fairness to all involved. In addition to the guidance already available in the decisions of this circuit, we believe the district court will be able to draw upon the practical alternative remedies to an onerous document-by-document *in camera* inspection by the trial judge, as pointed out in *EPA v. Mink*, *supra*, 410 U.S. at p. 93. Imaginative procedures, such as those suggested in *Mink*, should in large measure alleviate the apprehended governmental burden and substantially reduce the 6,000 hours which its affiants estimate to be required to produce and examine the requested documents.

Accordingly, the judgment of the district court is affirmed and the case remanded to the district court for further proceedings.

## APPENDIX B

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

FRUEHAUF CORPORATION, WILLIAM E. GRACE, ROBERT ROWAN,  
*Defendants.*

Criminal No. 45325

## MEMORANDUM AND ORDERS

## MOTION FOR DISCOVERY AND INSPECTION

Paragraph 6 of the motion reads as follows:

All private rulings and letter rulings issued by the National Office of the Internal Revenue Service since January 1, 1954, with respect to: Sections 4061(a)(1), 4216(a), 4216(b)(1) and (2), 4216(f) and 6416(c) of the Internal Revenue Code of 1954, and all Treasury Regulations issued or used in connection with such sections, in respect to determinations of: the "price" for which an article is sold; the applicable "constructive sales price" resulting from sales in the ordinary course of business, sales to retailers, sales to wholesalers, or sales to wholesale distributors; the "existence" of a retailer, wholesaler or wholesale distributor; or the "existence" of sales at retail, sales at wholesale, and sales to wholesale distributors.

In the defendants' Motion for Disclosure of Exculpatory Information the defendants have made a request similar to that contained in paragraph 6 of their Motion for Discovery and Inspection. In its response the Government concedes that under Section 552(a)(3) of 5 U.S.C. (the Freedom of Information Act) the Internal Revenue Service records (except privileged or confidential trade secrets and commercial or financial information obtained from a taxpayer) are available to any person under proper request for identifiable records, and refers defendants to 26 C.F.R., Section 601.702(c).

In a supplemental brief in support of its request in paragraph 6 of its motion the defendants rely upon *Hawkes v. Internal Revenue Service*, 467 F.2d 787, 789-791 (CA 6, 1972) as authority for obtaining the material requested in said paragraph. The facts involved in *Hawkes* are as follows: Hawkes was indicted for tax fraud. As part of his effort to prepare a defense Hawkes sought to obtain information and documents held by the Internal Revenue Service. He sought some of the desired material through the regular discovery procedures provided by Rules 16 and 17(c) of the Rules of Criminal Procedure. Additionally he sought materials and information directly from the Internal Revenue Service. Concerning this the Court said:

In July, 1970 a letter was sent to the Assistant Commissioner of Internal Revenue formally requesting: (1) copies of Forms 899 and 4340 recording past assessments and payments relevant to *Hawkes' federal tax obligations*; (2) copies of IRS documents pertaining to the "closing" of an audit of Hawkes' 1965 tax returns; (3) specified portions of the Internal Revenue Manual relating to the examination of returns, interrogation of taxpayers by agents of the



Service and other matters which Hawkes felt would be useful in preparing a defense. While the first two sets of material had also been requested in the motion for discovery, the Manual was requested for the first time in the letter to the Assistant Commissioner. [Emphasis supplied.]

• • •

The parties' attention on appeal, as below, has of course been focused upon the question of whether or not disclosure of the designated portions of the Internal Revenue Service Manual is required by the Freedom of Information Act. It is to a consideration of that question that we now turn.

The question that has been submitted for the consideration of the Court of Appeals in the Hawkes case is not one involving the same type of request that is contained in paragraph 6 of the defendants' Motion for Discovery and Inspection.

The Court of Appeals for the Ninth Circuit, in *Gollaher v. United States*, 419 F 2d 520, 527-528 (CA 9, 1969) considered a question involving inspection not too unlike the request of the defendants in paragraph 6 of their motion. That Court determined the matter as follows:

Appellants claim that intra-agency communications might have shown that the F.H.A.'s attitude in pursuing the prosecution was one of bias and that it was error not to permit inspection of such communications.

While "the determination of what may be useful to the defense can properly and effectively be made only by an advocate," [Dennis v. United States, supra at 875, 86 S.Ct. at 1851] the materials upon which such a determination is sought to be made must in the first instance be discoverable, a prerequisite absent in this case. Federal Rules of Criminal Procedure, Rule 16(b) provides in part that the discovery authorized by Rule 16 "does not authorize the discovery or inspection of

reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case • • •." There are two exceptions. The first is the authorization of inspection of any relevant results or reports of physical or mental examinations, scientific tests or experiments made in connection with the particular case. The second relates to the right in a criminal prosecution to inspect a statement or report in the possession of the United States which was made by a government witness or prospective government witness after said witness has testified on direct examination in the trial of the case. 18 U.S.C. §3500. Neither exception is applicable in the present case.

In the Government's Supplemental Memorandum in Opposition to Defendants' Motion for Inspection of Private Revenue Rulings, the Government concluded with the following:

The Government will produce for *in camera* inspection by this Court any private revenue ruling within its possession which is identified by the Defendants as one upon which they relied. The Government requests *in camera* inspection by the Court in order to protect any third-party taxpayer from disclosure of confidential or privileged information which may be contained in any such private ruling.

With the exception of the Government's foregoing offer, the request in paragraph 6 is denied.

Paragraph 7 of the motion is as follows:

All documents in the possession of the government which indicate that other taxpayers subject to the manufacturer's excise tax, computed a tire tax credit based on the invoice price of tires rather than the invoice price less subsequent rebates or trade and volume discounts.

The request in paragraph 7 of defendants' motion is denied for the same reasons this Court denied the request in paragraph 6.

## APPENDIX C

5 U.S.C. 552 [AS AMENDED BY SECTION 1(b) AND 2(c), PUB. L. 93-502, 93D CONG., 2D SESS., 88 STAT. 1561, 1564]. PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS

(a) Each agency shall make available to the public information as follows:

\* \* \*

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; \* \* \*

\* \* \*

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

\* \* \*

(b) This section does not apply to matters that are—

\* \* \*

(3) specifically exempted from disclosure by statute;

\* \* \*

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

\* \* \*

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6103. [as amended by Sec. 4(a), Act of November 2, 1966, P.L. 89-713, 80 Stat. 1107] PUBLICITY OF RETURNS AND DISCLOSURE OF INFORMATION AS TO PERSONS FILING INCOME TAX RETURNS.

(a) *Public Record and Inspection.*—

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) [as amended by Sec. 3(c), Interest Equalization Tax Act, P.L. 88-563, 78 Stat. 809 and Sec. 601(a), Excise Tax Reduction Act of 1965, P.L. 89-44, 79 Stat. 136] All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, and subchapter B of chapter 37, and chapter 41, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person, a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Secretary or his delegate. The Secretary or his delegate may prescribe a reasonable fee for furnishing such copy.

(b) *Inspection by States.*—

(1) *State officers.*—The proper officers of any State may, upon the request of the governor thereof, have access to the returns of any corporation, or to an abstract thereof showing the name and income of any corporation, at such times and in such manner as the Secretary or his delegate may prescribe.



(2) *State bodies or commissions.*—All income returns filed with respect to the taxes imposed by chapters 1, 2, 3, and 6 (or copies thereof, if so prescribed by regulations made under this subsection), shall be open to inspection by any official, body, or commission, lawfully charged with the administration of any State tax law, if the inspection is for the purpose of such administration or for the purpose of obtaining information to be furnished to local taxing authorities as provided in this paragraph. The inspection shall be permitted only upon written request of the governor of such State, designating the representative of such official, body, or commission to make the inspection on behalf of such official, body, or commission. The inspection shall be made in such manner, and at such times and places, as shall be prescribed by regulations made by the Secretary or his delegate. Any information thus secured by any official, body, or commission of any State may be used only for the administration of the tax laws of such State, except that upon written request of the governor of such State any such information may be furnished to any official, body, or commission of any political subdivision of such State, lawfully charged with the administration of the tax laws of such political subdivision, but may be furnished only for the purpose of, and may be used only for, the administration of such tax laws.

(c) *Inspection by Shareholders.*—All bona fide shareholders of record owning 1 percent or more of the outstanding stock of any corporation shall, upon making request of the Secretary or his delegate, be allowed to examine the annual income returns of such corporation and of its subsidiaries.

(d) *Inspection by Committees of Congress.*—

(1) *Committees on ways and means and finance.*—

(A) The Secretary and any officer or employee of the Treasury Department, upon request from the Committee on Ways and

Means of the House of Representatives, the Committee on Finance of the Senate, or a select committee of the Senate or House specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution, shall furnish such committee sitting in executive session with any data of any character contained in or shown by any return.

(B) Any such committee shall have the rights, acting directly as a committee, or by or through such examiners or agents as it may designate or appoint, to inspect any or all of the returns at such times and in such manner as it may determine.

(C) Any relevant or useful information thus obtained may be submitted by the committee obtaining it to the Senate or the House, or to both the Senate and the House, as the case may be.

(2) *Joint committee on internal revenue taxation.*—The Joint Committee on Internal Revenue Taxation shall have the same right to obtain data and to inspect returns as the Committee on Ways and Means or the Committee on Finance, and to submit any relevant or useful information thus obtained to the Senate, the House of Representatives, the Committee on Ways and Means, or the Committee on Finance. The Committee on Ways and Means or the Committee on Finance may submit such information to the House or to the Senate, or to both the House and the Senate, as the case may be.

(e) *Declarations of Estimated Tax.*—For purposes of this section, a declaration of estimated tax shall be held and considered a return under this chapter.

(f) [as amended by Sec. 4(a)(2), Act of November 2, 1966, *supra*] *Disclosure of Information as to Per-*



*sons Filing Income Tax Returns.*—The Secretary or his delegate shall, upon inquiry as to whether any person has filed an income tax return in a designated internal revenue district for a particular taxable year, furnish to the inquirer, in such manner as the Secretary or his delegate may determine, information showing that such person has, or has not, filed an income tax return in such district for such taxable year.

**TREASURY REGULATIONS ON PROCEDURE AND ADMINISTRATION (26 C.F.R.):**

§ 301.6103(a)—1. *Inspection of returns by certain classes of persons and State and Federal government establishments pursuant to Executive order.* (a) *In general*—(1) *Authority.* The President is authorized by subsection (a) of section 6103 to open to public examination and inspection returns in respect of the taxes described in paragraphs (1) and (2) of such subsection. In addition, section 6106 provides that returns in respect of the tax described therein (unemployment tax imposed by chapter 23 of the Code) shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns of the taxes described in section 6103, except that subsections (a)(2) and (b)(2) of section 6103, and subsection (a)(2) of section 7213 (relating to unauthorized disclosure of information) shall not apply.

\* \* \*

(3) *Terms used*—(i) *Return.* For purposes of section 6103(a), the term “return” includes—(a) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and (b) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (a) of this subdivision. \* \* \*

**APPENDIX D**

[Filed and Entered January 30, 1974]

In the United States District Court for the Eastern  
District of Michigan

Civil No. 4-70345

FRUEHAUF CORPORATION, A MICHIGAN CORPORATION,  
ET AL., PLAINTIFFS

v.

INTERNAL REVENUE SERVICE, DEFENDANT  
*Order*

At a session of said Court held in the Federal Building, City of Detroit, County of Wayne, and State of Michigan, on January 30, 1974.

Present: Honorable THOMAS P. THORNTON, District Court  
Judge

Upon the considerations expressed in the Court's Opinion entered herein on January 11, 1974 and upon consideration of the entire record herein, it is,

ORDERED, That Defendant's Motion for Summary Judgment be and hereby is denied, and it is

FURTHER ORDERED, that pursuant to 5 U.S.C. 552 and Rule 65(a)(2) of the Federal Rules of Civil Procedure, Defendant, its agents, attorneys and employees are permanently enjoined from withholding the records requested by Plaintiffs and it is,

FURTHER ORDERED, that commencing from the date upon which Defendant is personally served with a true copy

this Order, and continuing for such reasonable length of time as may be necessary, Defendant shall make available to Plaintiffs for inspection and copying, all of the following records and documents intact and without deletion, except for those items which, within said period of time, Defendant submits to the Court, or to a Special Master, to be appointed by the Court, sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the Court or his Special Master, as to whether the proposed deletions are justified under the Freedom of Information Act, together with a detailed written explanation of the justification for each deletion:

(1) All unpublished private rulings and/or letter rulings originating in the Miscellaneous and Special Provisions Tax Division, Excise Tax Branch, of the Office of Assistant Commissioner (Technical), Internal Revenue Service, which were issued between January 1, 1947 and to September 13, 1973 to manufacturers of automobile truck chassis, automobile truck bodies, truck and bus trailer and semi-trailer chassis, truck and bus trailer and semi-trailer bodies, and tractors of a kind chiefly used for highway transportation in combination with a trailer or semi-trailer, or to any trade association of any one or more such manufacturers, in which determinations were made of:

(a) All items includable or excludable in the price for which a taxable article is sold under section 4216(a) of the Internal Revenue Code (or any predecessor section) and any Regulations issued pursuant thereto.

(b) The methods, means, formulae or procedures for determining or computing, by a manufacturer of taxable articles, the applicable constructive sales price, under section 4216(b), section 4216(b)(1), and section 4216(b)(2),

of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued pursuant thereto, upon sales by such manufacturers to:

- (1) a retailer
- (2) a wholesaler
- (3) a wholesaler distributor
- (4) a user or ultimate consumer

(c) The existence or non-existence under section 4216 (b) of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued pursuant thereto, particularly (without limitation) Treasury Regulations Section 148.1-5 and Treasury Regulations 46 (1940), Sections 216.8, 316.10, 316.12, 316.13, 316.14 and 316.15, of:

- (1) a retailer
- (2) a wholesaler
- (3) a wholesale distributor
- (4) sales at retail
- (5) sales at wholesale
- (6) sales to wholesale distributors

(d) The methods, means, formulae, or procedures for determining or computing, by a manufacturer of taxable articles, the applicable exclusion of *local* advertising charges from the sales prices of taxable articles under section 4216(f) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(e) The methods, means, formulae, of procedures for determining or computing, by a manufacturer of taxable articles, the credit for tax paid on tires or inner tubes under

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section 6416(c) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(f) The definition of the term "the purchase price" as used in section 6416(c)(1) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(g) The definition(s) of taxable and nontaxable trailers, semi-trailers, truck and bus trailers and semi-trailer chassis, truck and bus trailer and semi-trailer bodies and containers under section 4061(a) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(h) The methods, means, formulae or procedures for computing the applicable tax under sections 4061(a) and 4216(b) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto on a projected or estimated basis instead of upon an article by article basis.

The terms "private rulings and/or letter rulings" shall include (without limitation) both ordinary letter rulings, unpublished private rulings, and those portions of the responses to Technical Advice requests that are or were intended for issuance to taxpayers.

(2) The files including correspondence, analysis and submissions of fact applicable to the issuance of:

Revenue Ruling 62—68, 1962—1 CB 216  
 Revenue Ruling 68—254, 1968—1 CB 479  
 Revenue Ruling 68—202, 1968—1 CB 477  
 Revenue Ruling 68—519, 1968—2 CB 513  
 Revenue Ruling 69—394, 1969—2 CB 206

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Revenue Ruling 54—25, 1954—1 CB 258  
 Revenue Ruling 54—448, 1954—2 CB 412  
 Revenue Ruling 54—61, 1954—1 CB 259  
 Revenue Ruling 283, 1953—2 CB 425  
 Revenue Ruling 62—221, 1962—2 CB 251  
 Revenue Ruling 63—238, 1963—2 CB 519  
 Revenue Ruling 58—287, 1958—1 CB 426  
 Revenue Ruling 60—241, 1960—2 CB 329  
 Revenue Ruling 59—74, 1959—1 CB 350  
 Revenue Ruling 59—163, 1959—1 CB 353  
 Revenue Ruling 65—9, 1965—1 CB 491  
 Revenue Ruling 60—185, 1960—1 CB 412  
 Revenue Ruling 69—580, 1969—2 CB 209  
 Revenue Ruling 69—568, 1969—2 CB 209  
 Revenue Ruling 71—240, 1971—1 CB 372  
 Revenue Ruling 68—509, 1968—2 CB 508  
 Revenue Ruling 70—54, 1970—1 CB 218  
 Revenue Ruling 73—231, IRB 1973—21, 11

(3) Communications with respect to such private rulings and/or letter rulings received by the Internal Revenue Service from persons outside the Executive Branch of the United States Government (including, without limitations, members of Congress, Congressional staff members, and persons acting on behalf of the parties seeking rulings), together with the responses of the Internal Revenue Service to these outside communications. The communications requested include (without limitation) letters, conference memoranda, and memoranda of telephone conversations, and it is,



(4) All items of the letter ruling indexing systems of the Internal Revenue Service as will enable Plaintiffs to ascertain whether additional unpublished private rulings and/or letter rulings, similar to those ordered available above, have been issued by the Treasury, including, but not limited to:

(a) the index-digest card file which is maintained by the Office of the Assistant Commissioner (Technical) involving "reference" (formerly "precedent") private and/or letter rulings files; and

(b) the sets (blocks) of cards maintained in alphabetical order by the Technical Records Section of Defendant that separately refer to all Technical files by taxpayer name and date of the file, beginning in 1954, involving "routine" (formerly "non-precedent") private and/or letter rulings files, and it is

FURTHER ORDERED, that Defendant shall not destroy or otherwise dispose of or alter any of the foregoing records and documents without the prior approval of this Court, after notice to the Plaintiffs.

/s/ *Thomas P. Thornton*  
Thomas P. Thornton,  
*Judge.*

A true copy, Henry R. Hanssen, Clerk, by V. Barrow,  
Deputy Clerk.

## APPENDIX E

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF  
MICHIGAN, SOUTHERN DIVISION  
Civil No. 4-70345

FRUEHAUF CORP., a Michigan corporation, WILLIAM E.  
GRACE, AND ROBERT D. ROWAN, PLAINTIFFS  
v.

INTERNAL REVENUE SERVICE, DEFENDANT

MEMORANDUM RE UNLAWFUL WITHHOLDING OF  
RECORDS

Plaintiffs herein commenced this action by filing their COMPLAINT REQUESTING AN INJUNCTION AGAINST UNLAWFUL WITHHOLDING OF RECORDS AND AN ORDER FOR PRODUCTION OF SUCH RECORDS. The action is brought pursuant to the Freedom of Information Act, 5 U.S.C.A. § 552. Plaintiffs here are defendants in a criminal action (No. 45325) in this court, brought by the United States against them in a one-count indictment that charges a conspiracy to:

(1) Defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service (IRS) of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of \$12,344,587.31 in Federal Manufacturer's Excise Taxes;

(2) Attempt to evade and defeat (contrary to Section 7201, Title 26, United States Code), the payment of \$12,344,587.31 in Federal Excise Taxes to be due and owing to the United States by the FRUEHAUF CORPORATION for the period October 1, 1956, through December 31, 1965:

(3) Aid or assist in, and procure, counsel and advise the preparation and presentation (in violation of Section 7206(2), Title 26, United States Code); of materially false and fraudulent Excise Tax Returns (IRS Form 720) for the defendant FRUEHAUF CORPORATION for all calendar quarter years beginning October 1, 1956, and ending December 31, 1965, the returns understating the amount of Excise Tax payable by FRUEHAUF CORPORATION totaling \$12,344,587.31.

During the course of pretrial discovery proceedings in the criminal case the defendants therein sought to obtain from the Government various records and material within the possession of the Government which they claimed would supply information essential to their defense. The position of the Government was that these were not properly subject to discovery in the criminal case but they could be obtained under the provisions of the Freedom of Information Act. The defendants in said criminal case then filed the instant civil action against the Internal Revenue Service. (The Court, in the criminal case, denied the discovery there sought by defendants on the theory that the Government appeared to be willing to furnish the information sought, pursuant to the Freedom of Information Act.) Subsequent to the filing of the instant action under the Freedom of Information Act the Government's position is that the documents sought are not available to plaintiffs under the Freedom of Information Act.

In their Answers to Interrogatories filed November 27, 1973, at page 2 thereof, plaintiffs give a general description of said documents as follows:

In general, Plaintiffs seek copies of unpublished private rulings and/or rulings, as defined in the complaint, originating in the Miscellaneous and Special

Provisions Tax Division, Excise Tax Branch, Office of Assistant Commissioner (Technical), Internal Revenue Service, between January 1, 1947 and June 26, 1973 to manufacturers of automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, and tractors of a kind chiefly used for highway transportation in combination with a trailer or semitrailer, or to any trade association of any one or more such manufacturers. In paragraphs 5a(1)(a) through 5a(1)(h) of Plaintiffs' Complaint, the specific subject matters of rulings requested are described in detail.

The specific subject matters of the rulings requested are set forth in the paragraphs as above indicated. They relate to those types of determinations which plaintiffs conceive to be relative to their defense of the charges contained in the indictment in the criminal case.

The Government filed its Motion for Summary Judgment requesting dismissal on the grounds that the "requested documents are exempt from disclosure under Section 552 (b)(3), Title 5 U.S.C. because of Section 6103 of the Internal Revenue Code of 1954."

The parties have filed extensive briefs herein, and the Court file contains numerous pleadings including various sets of interrogatories and answers thereto. Plaintiffs' Answers to Interrogatories filed November 27, 1973 (docket entry No. 18) contains the following paragraph, which we deem of controlling significance:

The documents sought are essential to the proper defense of the criminal case in view of the fact that under the authority of *International Business Machines Corporation v. U.S.*, 343 F. 2d 914 (Ct. Cl. 1965), cert. den. 382 U.S. 1028, if rulings were issued to other

taxpayers which provided a benefit to those taxpayers which Fruehauf did not enjoy, then Fruehauf is entitled to the benefit of such rulings. The basis for this theory is Section 1108(b) of the Revenue Act of 1926 which provides that if the Service has issued a ruling, Treasury decision or regulation holding the sale or lease of an article was not taxable and a taxpayer has parted with possession of an article relying upon the ruling, regulation, or Treasury decision, that such item was not taxable, then no tax shall be levied, assessed or collected. In the case of *International Business Machines Corporation v. U.S.*, *supra*, the Court of Claims had presented to it the question of whether, if such a ruling were granted to a third party, the benefit of such ruling must also be granted to other taxpayers. The Court of Claims concluded that in view of the fact that a ruling, which had been issued to one taxpayer, could not be revoked retroactively, that such ruling must be made available to other taxpayers during the period it was unrevoked in order to carry out the intent of Congress that excise tax not be applied in a discriminatory manner. Thus, under the authority of such case, private rulings which were issued and which remained unrevoked during any period covered by the criminal case must be available to Plaintiffs. Plaintiffs have reason to believe that private rulings which would be favorable do exist, and Plaintiffs are entitled to rely upon such rulings in their defense in the criminal case.

The Freedom of Information Act, 5 U.S.C.A. § 552(b) sets forth nine exceptions to the statutory disclosure act. The one relied upon by the Government—

“(b) This section does not apply to matters that are—

• • •

“(3) specifically exempted from disclosure by statute;” 5 U.S.C.A. § 552(b)(3).

is relied upon, the Government says, because of 26 U.S.C.A. § 6103. We consider that none of the nine exceptions has application to the material here sought by plaintiffs and that 26 U.S.C.A. § 6103 provides for the protection of the privacy of persons filing Income Tax Returns. To the extent that any of the material sought by plaintiffs might constitute an invasion of the privacy of taxpayers there are means that may be employed to avoid such disclosure. In furnishing plaintiffs the information relevant to their defense there need be no violation of Section 6103 of Title 26 of the Internal Revenue Code.

The Sixth Circuit has provided us with guidelines and helpful discussion concerning the Freedom of Information Act in the case of *Hawks v. Internal Revenue Service*, 467 F. 2d 787 (1972). Although the facts in that case are entirely different from the instant situation the opinion of the Court of Appeals in *Hawkes* convinces this Court that the material here sought by plaintiffs should be made available to them and that such material as they seek does not come within the nine exceptions set forth in the Act.

An order in accordance with the foregoing may be presented on notice.

THOMAS P. THORNTON,  
United States District Judge.

Dated: January 11, 1974.





No. 75-679

Supreme Court, U. S.  
FILED

DEC 29 1975

MICHAEL W. BORK, JR., CLERK

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In the Supreme Court of the United States  
OCTOBER TERM, 1975

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INTERNAL REVENUE SERVICE, PETITIONER

v.

FRUEHAUF CORPORATION, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

---

REPLY MEMORANDUM FOR THE PETITIONER

---

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**In the Supreme Court of the United States**

OCTOBER TERM, 1975

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INTERNAL REVENUE SERVICE, PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
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**REPLY MEMORANDUM FOR THE PETITIONER**

---

1. In opposing the petition for a writ of certiorari, respondents' principal argument is that their request under the Freedom of Information Act "concerns only documents relating to the interpretation of the manufacturers excise tax law and *not* income tax law" (Br. in Opp. 7, emphasis in original). However, for purposes of exemption 3 of the Freedom of Information Act which bars disclosure of "matters that are \* \* \* specifically exempted from disclosure by statute," there is no difference between the excise tax letter rulings and technical advice memoranda sought by respondents and their counterparts under the income tax law. The principle of confidentiality embodied in Section 6103 of the Internal Revenue Code is all inclusive since it is "with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32 \* \* \* ." See Section 6103(a)(2). Thus, there can be no doubt that this statutory bar against disclosure encompasses excise tax information in the custody of the Internal



Revenue Service as well as income tax information. Indeed, respondents' reliance (Br. in Opp. 6, 15) upon the holding of *Tax Analysts & Advocates v. Internal Revenue Service*, 505 F.2d 350 (C.A.D.C.), that *income tax* letter rulings are subject to disclosure under the Freedom of Information Act, belies their assertion that excise tax documents are to be governed by a different rule.<sup>1</sup>

2. Contrary to respondents' further contention (Br. in Opp. 13), nothing in Section 1108(b) of the Revenue Act of 1926, 44 Stat. 9, 114, demonstrates that Congress intended that excise tax letter rulings were a body of law to be made generally available to third parties who could rely upon them in support of a particular tax result.<sup>2</sup> That provision, which originated as Section 1008(b) of the Revenue Act of 1924, 43 Stat. 253, 341, and which is still in force,<sup>3</sup> states as follows:

No tax shall be levied, assessed or collected under the provisions of Title VI of this Act [the excise tax

<sup>1</sup>However, in relying on *Tax Analysts & Advocates*, respondents avoid any discussion of the portion of that decision holding that technical advice memoranda are not covered by exemption 3. As we pointed out in our petition (pp. 7, 11-14), the decision below squarely conflicts with *Tax Analysts & Advocates* on this question.

<sup>2</sup>In urging that excise tax letter rulings are a body of law that should be made generally available, respondents assert (Br. in Opp. 8) that the importance of these rulings is underscored by the fact that excise tax controversies can only be litigated in refund suits, which are impractical where large deficiencies must be paid in full prior to suit. This is simply not the case. In *Flora v. United States*, 362 U.S. 145, 171, n. 37, this Court observed that excise tax deficiencies are divisible into a tax on each transaction or event, so that the "full payment" rule governing income, estate and gift tax refund suits would not be applicable to excise tax refund suits.

<sup>3</sup>See Section 12.07 of Rev. Rul. 54-172, 1954-1 Cum. Bull. 394, 401; and Statement of Procedural Rules, Section 601.201 (1)(8) (26 C.F.R.).

provisions] on any article sold or leased by the manufacturer, producer, or importer, if at the time of the sale or lease there was an existing ruling, regulation, or Treasury decision holding that the sale or lease of such article was not taxable, and the manufacturer, producer or importer parted with possession or ownership of such article, relying upon the ruling, regulation, or Treasury decision.

The legislative history underlying this statute indicates that it was enacted in response to a specific situation that had come to the attention of Congress where the Commissioner had published a particular excise tax ruling which advised manufacturers of certain automobile parts that they could obtain tax refunds if they passed the refund on to their customers. After many manufacturers refunded the taxes to their customers, the Commissioner revoked the ruling and ordered the taxes paid on these items within ten days. As a result, some manufacturers were unable to collect the tax again from their customers and were forced to suffer the financial detriment of paying the assessments themselves. See 65 Cong. Rec. 8116-8117 (1924).

It is therefore apparent that Section 1108(b) was only intended to address the situation where a manufacturer acts to his detriment by relying upon an excise tax ruling which was either issued to him or published by the Commissioner. Under these circumstances, the Service cannot collect excise taxes from such a manufacturer during the period in which a ruling issued to it is in force. Indeed, in *International Business Machines Corp. v. United States*, 343 F.2d 914, 921-922 (Ct. Cl.), certiorari denied, 382 U.S. 1028, upon which respondents rely (Br. in Opp. 12-13), the court noted the limited reach of the statute. See also *Cory Corp. v. Sauber*, 363 U.S. 709, 713, 717 (Frankfurter and Clark, J.J., dissenting). Thus, in enacting

Section 1108(b). Congress did not alter the well established principle that a letter ruling issued to one taxpayer is not binding on the Treasury with respect to other taxpayers. See, e.g., *Goodstein v. Commissioner*, 267 F.2d 127, 132 (C.A. 1); *Weller v. Commissioner*, 270 F.2d 294, 298-299 (C.A. 3), certiorari denied, 364 U.S. 908; *Minchin v. Commissioner*, 335 F.2d 30, 32-33 (C.A. 2); *Bornstein v. United States*, 345 F.2d 558, 564 (Ct. Cl.); *Knetsch v. United States*, 348 F.2d 932, 940 (Ct. Cl.), certiorari denied, 383 U.S. 957; *Bookwalter v. Brecklein*, 357 F.2d 78, 82-84 (C.A. 8); *Shakespeare Co. v. United States*, 389 F.2d 772, 777-778 (Ct. Cl.). See also *Dixon v. United States*, 381 U.S. 68, 71-73; *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180; *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 468. Accord: Statement of Procedural Rules, Section 601.201 (1)(1) (26 C.F.R.). The excise tax letter rulings issued to other taxpayers are therefore of no legal significance with respect to respondents' tax liability.

3. Finally, respondents argue (Br. in Opp. 14-15) that the submission of financial information to other federal agencies, such as the Department of Labor and the Securities and Exchange Commission, demonstrates that the data contained on a tax return is not confidential. However, the publication of such data by other federal agencies pursuant to their own statutory directives is irrelevant to this case. The critical fact is that in the absence of a specific statutory requirement that the agency publish such information, Section 6103 of the Internal Revenue Code bars its disclosure. Indeed, this was made clear by the three-judge district court in *Association of American Railroads v. United States*, 371 F. Supp. 114 (D. D.C.). While the court acknowledged in that case that the Interstate Commerce Commission had broad powers to require submission of financial data by public carriers,

it concluded that the Commission's statutory authority did not require the publication of such information and that Section 6103 of the Internal Revenue Code prohibited its publication. In so holding, the court stated in terms pointedly appropriate to this case (371 F. Supp. at 116):

The protection of the data contained in Federal tax returns is an essential part of our scheme of taxation. Individuals and corporations have the right to expect that information contained in tax returns will not be made available by the government to the public. The policy of confidentiality for income tax data encourages the full disclosure of income by taxpayers in that the individual or corporate taxpayer is assured that his neighbor or competitor will not be apprised of the intimate details of his financial life. [Footnote omitted.]

For the reasons stated above and in our petition for a writ of certiorari, the petition should be granted.

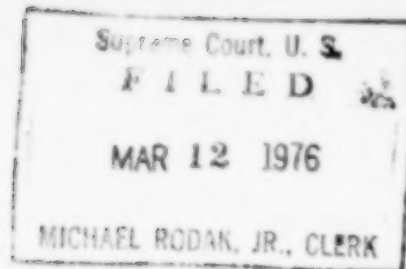
Respectfully submitted,

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DECEMBER 1975.



No. 75-679

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**BRIEF FOR THE PETITIONER**

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**In the Supreme Court of the United States**

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OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. A 1A-6A; A. 47-51) is reported at 369 F. Supp. 108. The subsequent injunctive order of the district court is set forth at Pet. App. A 7A-12A and A. 52-57. The opinion of the court of appeals (Pet. App. B 13A-27A; A. 78-90) is reported at 522 F. 2d 284.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1975 (Pet. App. C 28A). A timely petition for rehearing was denied on August 8, 1975 (Pet.

(1)

App. D 29A). The petition for a writ of certiorari was filed on November 6, 1975, and was granted on January 12, 1976 (A. 102). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Exemption 3 of the Freedom of Information Act bars disclosure of "matters that are \* \* \* specifically exempted from disclosure by statute." The question presented is whether this exemption covers Internal Revenue Service letter rulings, technical advice memoranda and related files because of the prohibition in 26 U.S.C. 6103 against public inspection of returns, where such documents contain information which is either part of or related to returns filed by particular taxpayers.

#### STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Freedom of Information Act, 5 U.S.C. 552; 18 U.S.C. 1905; Sections 6103 and 7213 of the Internal Revenue Code of 1954 (26 U.S.C.); and Treasury Regulations on Procedure and Administration (1954 Code), Section 301.6103(a)-1 (26 C.F.R.) are set forth in the Appendix, *infra*, pp. 40-45.

#### STATEMENT

1. Respondent Fruehauf Corporation manufactures trucks and their parts and accessories. It is accordingly subject to the federal excise tax upon manufacturers of automobile and truck chassis and bodies, and their parts and accessories, imposed by Section 4061 of the Internal Revenue Code of 1954, and re-

quired to file quarterly returns as provided by Treasury Regulations on Manufacturers and Retailers Excise Taxes (1954 Code), Section 48.6011(a)-1 (26 C.F.R.).

The manufacturer's excise tax is a prescribed percentage of the manufacturer's sales price of taxable articles. For purposes of the excise tax provisions, Section 4216(a) of the Code defines price to include certain packing and transportation charges. Section 4216(b) provides for computation of the tax on the basis of a constructive sales price if the manufacturer sells: (1) at retail, (2) on consignment, (3) at less than the fair market value (unless in an arm's length transaction), or (4) to a related distributor in the case of automobiles and trucks.

After a nonjury trial in the United States District Court for the Eastern District of Michigan, respondents Fruehauf Corporation and two of its officers, William E. Grace and Robert D. Rowan were convicted<sup>1</sup> of conspiracy (1) to defraud the United States by defeating the assessment of the Section 4061 federal manufacturer's excise tax; (2) to attempt to evade such excise taxes of \$12,344,587, for the period October 1, 1956 to December 31, 1965, in violation of 26 U.S.C. 7201; and (3) to aid and advise in the preparation of materially false and fraudulent excise tax returns filed by Fruehauf Corporation for such

<sup>1</sup> Respondents were adjudged guilty in July, 1975. The district court has postponed sentencing pending its disposition of respondents' motions for a new trial. The findings of the district court in the criminal case are unofficially reported at 36 A.F.T.R. 2d 5979 (July 17, 1975).



periods which understated Fruehauf's excise tax liability by \$12,344,587, in violation of 26 U.S.C. 7206(2) (Pet. App. A 1A-2A).

During pretrial discovery proceedings in the criminal case, respondents had sought to obtain from the government various documents in the possession of the Internal Revenue Service. These documents consisted principally of private letter rulings issued to various taxpayers with respect to their Section 4061 manufacturer's excise tax liability for trucks and automotive parts and the computation of their sales price under Section 4216, the credit for tires under Section 6416 (c), and related matters. The government responded that such material was not subject to discovery under the Federal Rules of Criminal Procedure and the district court denied respondents' discovery request (A. 15-17).

2. Prior to the trial of the criminal case, respondents commenced this action in the United States District Court for the Eastern District of Michigan under the Freedom of Information Act (FOI Act), 5 U.S.C. 552, seeking copies of various documents submitted to and prepared by the Internal Revenue Service between January 1, 1947 and September 13, 1973 (the date of the complaint). These documents related to the Internal Revenue Service's determinations with respect to whether particular vehicles were subject to the manufacturer's excise tax, and its methods of computation of the sales price of such vehicles and related articles. Specifically, respondents sought (Pet. App. A 2A-3A; A. 9-14, 48-49):

(1) all "unpublished private rulings and/or letter rulings" issued by the Excise Tax Branch, Internal Revenue Service since January 1, 1947 to manufacturers of automobile and truck chassis and bodies, involving any of a number of specified determinations with respect to price, constructive price, and coverage under Sections 4216, 4061, and 6416 of the Code;

(2) Internal Revenue Service files, including correspondence, analysis and submissions of fact applicable to 23 published Revenue Rulings;<sup>2</sup>

(3) communications received by the Internal Revenue Service from persons outside the executive branch of the government with respect to the requested private letter rulings;

(4) so much of the Internal Revenue Service's letter ruling indexing system as would enable respondents to determine whether additional similar letter rulings have been issued by the Service.

<sup>2</sup> The published Revenue Rulings with respect to which correspondence, analysis, and submissions of fact were demanded, were as follows: Rev. Rul. 62-68, 1962-1 Cum. Bull. 216; Rev. Rul. 68-254, 1968-1 Cum. Bull. 479; Rev. Rul. 68-202, 1968-1 Cum. Bull. 477; Rev. Rul. 68-519, 1968-2 Cum. Bull. 513; Rev. Rul. 69-394, 1969-2 Cum. Bull. 206; Rev. Rul. 54-25, 1954-1 Cum. Bull. 258; Rev. Rul. 54-448, 1954-2 Cum. Bull. 412; Rev. Rul. 54-61, 1954-1 Cum. Bull. 259; Rev. Rul. 283, 1953-2 Cum. Bull. 425; Rev. Rul. 62-221, 1962-2 Cum. Bull. 251; Rev. Rul. 63-238, 1963-2 Cum. Bull. 519; Rev. Rul. 58-287, 1958-1 Cum. Bull. 426; Rev. Rul. 60-241, 1960-2 Cum. Bull. 329; Rev. Rul. 59-74, 1959-1 Cum. Bull. 350; Rev. Rul. 59-163, 1959-1 Cum. Bull. 353; Rev. Rul. 65-9, 1965-1 Cum. Bull. 491; Rev. Rul. 60-185, 1960-1 Cum. Bull. 412; Rev. Rul. 69-580, 1969-2 Cum. Bull. 209; Rev. Rul. 69-568, 1969-2 Cum. Bull. 209; Rev. Rul. 71-240, 1971-1 Cum. Bull. 372; Rev. Rul. 68-509, 1968-2 Cum. Bull. 508; Rev. Rul. 70-54, 1970-1 Cum. Bull. 218; Rev. Rul. 73-231, 1973-1 Cum. Bull. 427. Twenty

Respondents' complaint specified that the term "private rulings and/or letter rulings" was meant to include "(without limitation) both ordinary letter rulings, unpublished private rulings, and those portions of the responses to Technical Advice requests that are or were intended for issuance to taxpayers" (A. 11). Respondents thereafter moved for a preliminary injunction against the Internal Revenue Service's further withholding of the documents they demanded (A. 25-26).

The Internal Revenue Service moved for summary judgment on the ground that the requested documents were exempt from disclosure under Exemption 3 of the FOI Act, 5 U.S.C. 552(b)(3), as "matters that are \* \* \* specifically exempted from disclosure by statute." The Service relied upon Section 6103 of the Internal Revenue Code of 1954 as the statute barring disclosure. That statute provides that tax returns shall be open to public examination only to the extent authorized in rules and regulations promulgated by the President (A. 33).

At an evidentiary hearing held by the district court on the respective motions of the parties (A. 2), the Internal Revenue Service submitted affidavits of three

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of the 23 Revenue Rulings are devoted, wholly or in part, to determinations under Section 4216, on facts set forth for illustrative purposes, of price or constructive price on which the excise tax imposed by Section 4061 was to be computed. The remaining three Revenue Rulings (Rev. Ruls. 60-185, 70-54, and 73-231) involved determinations whether particular articles manufactured and sold as described were subject to the manufacturer's excise tax.

of its high-ranking officials. These affidavits (A. 39-46) described the nature of the documents requested by respondents and the Service's policy with respect to such documents.

Singleton B. Wolfe, the Director of the Audit Division, stated in his affidavit that a "ruling" is a written statement issued to a taxpayer or his authorized representative by the National Office which interprets and applies the tax laws to a specific set of facts" (A. 39). See Statement of Procedural Rules, Section 601.201(a)(2) (26 C.F.R.). He described a "technical advice memorandum" requested by respondents as an expression of the views of the Service as to the application of the law to the facts of a specific case. These memoranda are furnished by the National Office upon the request of a district director in connection with the examination of a taxpayer's return or consideration of a claim for refund. See Statement of Procedural Rules, Section 601.105(b)(5)(i). Wolfe explained that the Internal Revenue Service prohibits its employees from relying upon rulings or technical advice memoranda as precedent in the disposition of other cases. He further stated that such documents are made available within the Internal Revenue Service only for use in connection with the determination of the tax liability of the taxpayers to whom they apply (A. 39-42).

The second affidavit, of John F. Simmons, Chief of the Field Liaison and Technical Manual Section, confirmed that none of the rulings or technical advice memoranda are circularized to the Service's field offices. He explained that a copy of each letter ruling



is sent to the district director who has audit jurisdiction of the return of the taxpayer requesting the ruling, in order to assist audit verification of the facts upon which the ruling was based; and that technical advice memoranda are sent to the particular district director requesting the advice (A. 44).

Milton Lichtman, Chief of the Excise Tax Branch, stated that, with three exceptions, the Internal Revenue Service files pertaining to the 23 published revenue rulings sought by respondents contained letter rulings and technical advice memoranda issued with respect to named taxpayers. He further stated that the files also contained applications and correspondence to and from such taxpayers with respect to letter rulings and technical advice (A. 46).

3. The district court rejected the government's claim that the materials were specifically exempt from disclosure by statute under Exemption 3 of the FOI Act. It concluded that Section 6103 of the Internal Revenue Code did not prohibit disclosure of the documents because "[it] provides for the protection of the privacy of persons filing *Income Tax Returns*," whereas the documents here involve the manufacturer's excise tax (Pet. App. A 5A-6A; A. 50; emphasis in original). The district court thereafter denied the Internal Revenue Service's motion for summary judgment and enjoined it from withholding the records demanded by respondents (Pet. App. A 7A-12A; A. 52-57). The court ordered that the Service make available the records and documents "intact and without deletion, except for those items which \* \* \* [it] submits to the

Court \* \* \* sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the Court \* \* \* as to whether the proposed deletions are justified under the Freedom of Information Act \* \* \*" (Pet. App. A 8A; A. 53).<sup>3</sup>

The court of appeals affirmed (Pet. App. B 13A-28A; A. 78-90). Although it ruled that the district court erred in construing Section 6103 to bar disclosure of only income tax returns (Pet. App. B 16A; A. 80), it held that letter rulings were not exempt from disclosure because they were not "returns" within the scope of Section 6103. While the court agreed that certain letter rulings might fall within the definition of "return" contained in the Regulations promulgated by the President under Section 6103, it concluded, in conformity with *Tax Analysts & Advocates v. Internal Revenue Service*, 505 F. 2d 350 (C.A.D.C.), that those regulations could not "immunize letter rulings from disclosure under the Freedom of Information Act," beyond that which Congress intended to protect under § 6103. 505 F. 2d at 354, n. 1." (Pet. App. B 20A; A. 84).

The court of appeals also held that technical advice memoranda were not protected from disclosure under Exemption 3 and Section 6103. In so holding, the court declined to follow the contrary result reached in *Tax*

<sup>3</sup> The district court denied the government's motion for a stay of its order pending appeal (A. 69-71). However, pursuant to the stipulation of the parties, the court of appeals ordered a stay pending its decision (A. 74-77). Pursuant to the order of Mr. Justice Stewart of October 9, 1975, the order of the district court is now stayed until final disposition of the case (A. 101).



*Analysts & Advocates, supra*, 505 F. 2d at 355, because it concluded that the district court's disclosure order was more limited with respect to these documents than the order in *Tax Analysts & Advocates*. Finally, the court concluded that the prohibition against disclosure in Section 6103 could be satisfied with respect to both technical advice memoranda and letter rulings through the process of *in camera* review and deletion in the district court (Pet. App. B 20A-22A; A 84-86).

#### SUMMARY OF ARGUMENT

1. Exemption 3 of the FOI Act (5 U.S.C. 552(b)(3)) provides that the Act does not apply to "matters that are \* \* \* specifically exempted from disclosure by statute." In *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, the Court held that Exemption 3 of the FOI Act was intended to exempt from disclosure material covered by the nearly 100 statutes that restrict public access to government records. As the Court there concluded, the FOI Act cannot be read as repealing these statutes by implication.

Section 6103 of the Internal Revenue Code of 1954, which dates from the very beginning of our modern tax system, is such a statute. Like the statute involved in the *Robertson* case, Congress, in its enactment of the FOI Act, was aware of Section 6103 as announcing a principle of confidentiality with respect to information in the possession of the Internal Revenue Service. The statute provides for nondisclosure of "returns" made with respect to taxes imposed by the

Code, including the manufacturer's excise tax here involved.

Respondents and the court of appeals do not quarrel with the proposition that Section 6103 is a nondisclosure statute of the type covered by Exemption 3. However, respondents contend, and the decision below held, that the specific documents at issue—letter rulings, technical advice memoranda, and related files—are not "returns" within the meaning of Section 6103. But if the principle of confidentiality embodied in Section 6103 is to have any meaning, the term "return" cannot, as respondents would have it, be limited to a prescribed official form. Indeed, the decisions of this Court establish that a "return" is a report with respect to tax liability and not simply an official form.

Given the large variety of documents submitted by taxpayers to the Internal Revenue Service and those prepared by the agency itself in connection with its determinations of tax liability, the nondisclosure principle of Section 6103 could easily be circumvented if it were limited to prescribed forms. Taxpayers frequently submit additional information either voluntarily or at the request of the Service in order to explain data reported on their returns. Similarly, at the conclusion of an audit, a revenue agent will prepare a report which refers to items on a return. Although these documents are not physically part of an official form, they all contain information either already reported on such a form or which is related to information so reported. The congressional policy against the disclosure of Internal Revenue Service

information relating to the liability of a particular taxpayer can be properly effectuated only if the applicability of Section 6103 depends upon the nature of the information sought and not the title of the particular documents on which it is written.

Thus, the Treasury Regulations under Section 6103 broadly define a "return" to include all written statements filed by the taxpayer "which are designed to be supplemental to \* \* \* the return" and "[o]ther records [etc.] relating to [such written statements]." 26 C.F.R. 301.6103(a)-1(a)(3)(i). These Regulations, which are promulgated by the President, encompass the documents at issue. As a reasonable implementation of the statutory policy of confidentiality of tax information, the Regulations should be sustained.

2. The foregoing considerations demonstrate that Section 6103 bars the disclosure of the letter rulings and technical advice memoranda sought by respondents. Letter rulings set forth detailed statements of fact submitted by taxpayers to the National Office of the Internal Revenue Service which are followed by the Service's legal conclusions. Such facts must be set forth in the ruling in order to indicate the basis on which the ruling is issued and to permit corroboration by an auditing agent. Thus, a letter ruling is essentially an advance audit procedure designed to promote public compliance with the tax law and uniformity of treatment.

The fact that the taxpayer submits facts to the Service prior to completion of his return in order to report his tax liability correctly furnishes no basis for

holding them less confidential than if such facts were first discovered upon an audit. It would be perverse to conclude that a taxpayer sacrifices confidentiality when he submits information to the Service in order that his completed return be correct, but that he retained confidentiality when he relies upon his own conclusions, so that only the chances of audit may turn up such information after the completed return is filed.

A technical advice memorandum is comparable to a letter ruling. It is an opinion of the National Office in response to a request from a field office as to the proper treatment of a transaction involved in an audit. Since it arises during audit of a return, it necessarily is entitled to the same confidentiality that Section 6103 provides for the return, if that provision is to have any meaning or purpose.

The court of appeals misunderstood the nature of the technical advice procedure. Contrary to its reasoning, the fact that a copy of the technical memorandum portion of a technical advice memorandum is furnished to the affected taxpayer is no reason why it should be made available to the general public. Indeed, the furnishing to a taxpayer of a copy of his own return is expressly authorized by the Section 6103 Regulations. Thus, the Service's practice of furnishing the affected taxpayer with a copy of the audit determination part of the technical advice memorandum does not breach the nondisclosure rule of Section 6103.

3. In order to fulfill the policy reflected in Exemp-



tion 3 of the FOI Act to continue the effectiveness of all of the statutes by which Congress had protected the confidentiality of various categories of government documents, Congress intended to protect all groups of documents to which the agencies had applied their nondisclosure statutes. Thus, when Congress in Exemption 3 continued the effectiveness of Section 6103, it necessarily intended to include the administrative interpretation of the reach of that section which is reflected by the policy of the Internal Revenue Service. It has been the consistent view and practice of the Executive Branch for more than 50 years, of which Congress has been made aware, that the term "return" in Section 6103 includes documents of the type of which respondents seek disclosure.

Even beyond its awareness of published regulations and rulings, Congress on several occasions has been informed that the Internal Revenue Service regularly withheld from public disclosure such letter rulings and technical advice memoranda. Indeed, during Congress' 1972 reexamination of the FOI Act, the Internal Revenue Service restated its view that Section 6103 of the Code prohibited disclosure of such documents, a conclusion with which the pertinent House subcommittee report agreed. Since the current Regulations were promulgated prior to the 1972 review and the 1974 amendment of the Freedom of Information Act, they not only have the authority primarily accorded by this Court to Treasury Regulations, but enjoy the added force of recent congressional consideration and acquiescence. In light of this continuing legislative scrutiny of the problem, Congress must be

deemed to have exercised an informed judgment that the disclosure policy of the FOI Act must yield to the public interest that the confidentiality of data submitted to the Internal Revenue Service must be preserved.

#### ARGUMENT

THE INTERNAL REVENUE SERVICE LETTER RULINGS, TECHNICAL ADVICE MEMORANDA AND RELATED MATERIALS ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 3 OF THE FREEDOM OF INFORMATION ACT BECAUSE THEY ARE MATTERS THAT ARE "SPECIFICALLY EXEMPTED FROM DISCLOSURE BY STATUTE"

#### A. INTRODUCTION

In *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, this Court held that Exemption 3 of the FOI Act, which covers "matters that are \* \* \* specifically exempted from disclosure by statute," was intended to exempt from disclosure material covered by the nearly 100 statutes that restrict public access to government records. After observing that "[n]othing in the [FOI] Act or its legislative history gives any intimation that all information in all agencies and in all circumstances is to be open to public inspection" (422 U.S. at 262), the Court concluded that Exemption 3 covers all statutes that require or permit nondisclosure of government information. As the Court stated, the FOI Act cannot be read as repealing by implication the various statutes providing for nondisclosure (*id.* at 265-266). Simply put, "Congress' response was to permit the numerous laws then extant allowing confidentiality to stand; it



is not for us to override that legislative choice" (*id.* at 266).

Thus, in considering a claim that material is covered by Exemption 3 as "matters that are \* \* \* specifically exempted from disclosure by statute," the only question "to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 95 n.\* (Stewart, J., concurring). See also *Administrator, Federal Aviation Administration v. Robertson, supra*, 422 U.S. at 270 (Stewart, J., concurring).

Section 6103 of the Internal Revenue Code is such a statute although, as we shall demonstrate, it is neither unwise nor self-protective, nor was its enactment inadvertent. From the very beginning of our modern tax system, the statute has embodied a principle of confidentiality of information in the possession of the Internal Revenue Service by virtue of its function as national tax collector. It is therefore not surprising that respondents have conceded (Br. in Opp. 9) that Section 6103, of which Congress was aware in enacting the FOI Act, is a statute that "specifically exempt[s]" from disclosure the matters it covers.

While the court of appeals recognized that Section 6103 is a nondisclosure statute which Exemption 3 covers, it erroneously limited its coverage to the printed and prescribed tax return forms filed by taxpayers. We submit that this restrictive gloss upon Section 6103 cannot be squared with the language and history of that statute and its implementing Regulations. They uniformly demonstrate that Congress in-

tended to prohibit the disclosure of the letter rulings, technical advice memoranda, and related files at issue here. Exemption 3 of the FOI Act therefore covers these documents.

B. SECTION 6103 OF THE INTERNAL REVENUE CODE BARS THE DISCLOSURE OF INTERNAL REVENUE SERVICE LETTER RULINGS, TECHNICAL ADVICE MEMORANDA, AND RELATED FILES

1. Section 6103(a) of the Internal Revenue Code of 1954, Appendix, *infra*, pp. 41-42, with exceptions not here relevant,<sup>1</sup> provides for the confidentiality of tax<sup>2</sup> returns by providing that they shall be "open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President." See Section 6103(a)(2). The Regulations (Section 301.6103(a)-1(d), (e), (f), and (g)) permit disclosure of tax returns to state and federal officers whose official duties require such inspection.

In Section 301.6103(a)-1(a)(3)(i) of those Regulations (26 C.F.R.), the term "return" is broadly defined to include—

(a) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and

<sup>1</sup> See Section 6103(b), (c), and (d), respectively, providing for inspection of returns by state officials, shareholders, and committees of Congress.

<sup>2</sup> The court of appeals held that the district court erred in construing Section 6103 to bar disclosure of only income tax returns (Pet. App. B 16A; A. 80). Section 6103(a)(2) explicitly covers returns for taxes imposed under Chapter 32 of the Code, which includes Section 4061, imposing the manufacturer's excise tax here involved.

(b) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (a) of this subdivision. \* \* \*

As we shall demonstrate, *infra*, the documents requested by respondents fit within this regulatory definition.

Insofar as it relates to income taxes, the confidentiality requirement with respect to tax returns have their earliest roots in Section 11 of the Act of July 14, 1870, c. 255, 16 Stat. 256, 259, which prohibited the publication of income tax returns. A similar nondisclosure rule was provided by Section 38 of the Act of August 5, 1909, c. 6, 36 Stat. 11, 116, which imposed an excise tax on corporations, measured by net income, as amended by the Act of June 17, 1910, c. 297, 36 Stat. 468, 494.<sup>6</sup> After Congress had imposed various manufacturer's excise taxes in Sections 601-629 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 259-270, it amended Section 55 of the Revenue Act of 1932 to extend to all returns the nondisclosure provisions that it had previously applied to income tax returns. See Section 218(h) of the National Industrial Recovery Act, c. 90, 48 Stat. 195, 209. The provisions barring disclosure of manufacturer's excise tax returns were carried forward in Section 55 of the Internal Revenue

<sup>6</sup> The somewhat unusual phrasing of the statute may be explained by the fact that Section 38 of the 1909 Act contained the following provisions (36 Stat. 116-117).

"Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which

Code of 1939 (26 U.S.C. (1952 ed.)) and are now set forth in Section 6103(a)(2) of the current Code.

Thus, Section 6103 has long imposed upon the Internal Revenue Service in comprehensive terms the obligation of confidentiality with respect to tax re-

may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

"Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court."

The seeming contradiction between these provisions was eliminated by the Act of June 17, 1910, *supra*. The Act foreclosed the implementation of the broad public disclosure provision in Section 38, Sixth of the 1909 Act, by providing in much the same fashion as Section 6103 of the current Code that "any and all such returns shall be open to inspection only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President." See 45 Cong. Rec. 4131, 4137-4138 (1910). Section II(G)(d) of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 177, consolidated the provisions and they were carried forward in successive Revenue Acts.

For a description of this statutory history, see *United States v. Dickey*, 268 U.S. 378, 387. Subsequent to the Income Tax Act of 1913, there were two short-lived experiments with limited disclosure of tax return information. See Section 257(b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 293, which was deleted by the Revenue Act of 1926. See H.R. Rep. No. 1, 69th Cong., 1st Sess. pp. 9-10 (1926). A second limited disclosure provision, Section 55(b) of the Revenue Act of 1934, c. 277, 48 Stat. 680, 698, was repealed in 1935 before it became effective. See Act of April 19, 1935, c. 74, 49 Stat. 158; H.R. Rep. No. 313, 74th Cong., 1st Sess., pp. 1-2 (1935).



turns. This nondisclosure rule is similar to that generally provided by 18 U.S.C. 1905, Appendix, *infra*, p. 41, which forbids government employees, under pain of criminal sanction, to disclose financial or commercial information received in the course of employment. Likewise, Section 7213 of the Internal Revenue Code, Appendix, *infra*, pp. 42-45, makes it a misdemeanor for various specified persons to divulge data set forth in an income tax return.<sup>7</sup>

The necessity for such nondisclosure of tax information hardly requires elaboration. Our self-reporting tax system depends in large measure upon the willingness of each taxpayer to submit voluntarily all information relevant to his tax liability, with the good faith expectation that the Internal Revenue Service will not disclose it to third parties. As this Court observed

<sup>7</sup> The first criminal sanction against the disclosure of tax information by officers or employees of the government, similar to Section 7213(b) of the 1954 Code, was imposed by Section 38 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 238, which was subsequently codified as R.S. 3167. Section 19 of the same statute provided that the "annual lists" required to be filed should be open to public inspection. This latter provision, however, was repealed by Section 11 of the Act of July 14, 1870, c. 255, 16 Stat. 256, 259, which prohibited the publication in any manner of "such income returns, or any part thereof." When the Act of August 27, 1894, c. 349, 28 Stat. 509, reimposed an income tax, Section 34 amended R.S. 3167 by adding provisions prohibiting disclosure of income tax information in terms similar to Section 7213(a) of the 1954 Code. Later revenue acts, prior to the adoption of the non-disclosure sanction of the 1939 Code, re-enacted R.S. 3167 without change. See, e.g., Revenue Act of 1926, c. 27, Section 1115, 44 Stat. 9, 117. Prohibition of disclosure of income tax information by officers or employees of the government is continued by Section 7213 (a) of the Internal Revenue Code of 1954. The criminal sanction against disclosure of information contained in returns other than income tax returns is contained in 18 U.S.C. 1905.

more than 75 years ago in *Boske v. Comingore*, 177 U.S. 459, 469-470, in upholding the validity of Regulations prohibiting disclosure of Treasury tax records which were sought by state revenue officers: "The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded."

In light of this longstanding policy against the disclosure of information furnished by taxpayers to the Treasury, it is not surprising that Section 6103 of the Internal Revenue Code was one of the nearly 100 statutes of which Congress was aware in its formulation of Exemption 3. See H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 10 (1966); House Committee Print, Federal Statutes on the Availability of Information, 86th Cong., 2d Sess., pp. 213-214 (1960); Hearings on S. 1666 and 1663 (in part) before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess., pp. 179-187 (1963).<sup>8</sup> It is therefore clear that in the FOI Act Congress intended to preserve the protective scope of Section 6103.

<sup>8</sup> Section 6103 was also listed in an exhibit (pp. 986, 1006) submitted during the Hearings on S. 921 (Freedom of Information and Secrecy in Government) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary conducted in 1958, 85th Cong., 2d Sess., as one of the "Statutory Provisions Restricting Disclosure of Government Information." See *Administrator, Federal Aviation Administration v. Robertson*, *supra*, 422 U.S. at 264-265 n. 11, where the Court relied upon that earlier exhibit as evidence of congressional awareness of various nondisclosure statutes. The predecessor to nondisclosure statute involved in that case, Section 1104 of the Federal Aviation Act, was listed in that 1958 exhibit.



2. Section 6103 prohibits the disclosure of the documents sought by respondents. By its terms, it bars the public inspection and examination of "returns made with respect to taxes \* \* \*." Although colloquial usage has identified the term "return" with the printed and prescribed form on which the great majority of tax returns are made, a return is, more accurately, simply a report, whether it be the return of an officer who has served process, an election return,<sup>9</sup> or the return of a taxpayer. As this Court pointed out in *Florsheim Bros. Co. v. United States*, 280 U.S. 453, 457, n. 3:

Statutes imposing direct taxes have always required taxpayers to file "lists" or "schedules" or "statements" or "returns" specifying in detail the information requisite for an assessment of the tax. The word "return" has not always been used. Sometimes it has been used as a synonym for "list," "schedule" or "statement." The specification in the statutes of the prescribed contents of such lists or returns has varied in its detail. But always definite statements of facts were required, from which the tax could be computed.<sup>10</sup>

<sup>9</sup> See Article I, Section 5 of the Constitution, which provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members \* \* \*" (emphasis supplied).

<sup>10</sup> See Act of July 9, 1798, c. 70, Section 9, 1 Stat. 580, 585-586; Act of July 1, 1862, c. 119, Sections 6, 93, 12 Stat. 432, 434, 475; Act of June 30, 1864, c. 173, Sections 11, 82, 98, 102, 109, 13 Stat. 223, 225, 258, 273, 275, 277; Act of August 5, 1909, c. 6, Section 38, 36 Stat. 11, 114; R.S. 3173. This usage is continued in the 1954 Code, where Section 6011 requires that any person liable for any tax, or for the collection thereof, "shall make a return or statement according to the forms and regulations prescribed \* \* \*."

On other occasions, the Court has employed the term "return" to connote the transmittal of information by the taxpayer. See, e.g., *United States v. Carroll*, 345 U.S. 457; *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180, 186-188. Thus, a tax return is not simply the piece of paper bearing a particular printed official form as its identifying label, but is a report of information relevant to tax liability.<sup>11</sup>

This principle emphasizing the substance of the information rather than its form is incorporated in the Treasury Regulations under Section 6103, which the President promulgated.<sup>12</sup> Under Section 301.6103(a)-1(a)(3)(i) of those Regulations, the term "return" is defined to include all written statements "filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return" and other written or oral information "relating to" such statements. By defining "return" to include all documents containing information reported in or related to a return, the Regulations insure that the statutory policy of confidentiality will not be defeated by confining the term "tax return" to the prescribed official printed form.

<sup>11</sup> For example, a taxpayer cannot avoid the criminal sanctions under Section 7203 of the Code for willful failure to file a return by filing the prescribed form, duly executed, but devoid of the required information relating to his tax liability. See, e.g., *United States v. Porth*, 426 F. 2d 519 (C.A. 10), certiorari denied, 400 U.S. 824; *United States v. Klee*, 494 F. 2d 394 (C.A. 9), certiorari denied, 419 U.S. 835; *United States v. Jordan*, 508 F. 2d 750 (C.A. 7), certiorari denied, October 6, 1975, No. 74-6323.

<sup>12</sup> Executive Order 11650, 37 Fed. Reg. 3739 (1972-1 Cum. Bull. 381).

The Regulation therefore reasonably implements and effectuates the congressional purpose. See, e.g., *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501.

The regulatory definition of "return" recognizes that the Internal Revenue Service has in its possession much information relating to the liabilities of taxpayers which is not set forth in prescribed official forms. Taxpayers frequently submit additional information either voluntarily or at the request of the Service in order to explain data reported on their returns. Similarly, at the conclusion of an audit, a revenue agent will prepare a report which refers to items on a return. The taxpayer may in turn file a protest to the agent's conclusions. Although these documents are not physically part of the prescribed official tax return form, they contain information either already reported in a return or related to items reported in a return.

The provision for confidentiality embodied in Section 6103 would have little meaning if it did not encompass these other documents relating to the tax liability of the taxpayer. The congressional policy against disclosure of Internal Revenue Service information relating to the liability of a particular taxpayer can be properly effectuated only if the applicability of Section 6103 depends upon the nature of the information sought and not the title of the particular documents on which it is written. See *Boske v. Comingore*, *supra*, 177 U.S. at 469-470; *St. Regis Paper Co. v. United States*, 368 U.S. 208,

217-219; *Heathman v. United States District Court*, 503 F. 2d 1032, 1035-1037 (C.A. 9) (Chambers, J., concurring and dissenting); *Association of American Railroads v. United States*, 371 F. Supp. 114, 116-118 (D.D.C.) (three-judge court). Simply put, the private character of the information in a tax return is not altered for purposes of Section 6103 because it is also recorded on other documents as part of the process of determining tax liability.

3. In holding that letter rulings and technical advice memoranda were not covered by Exemption 3 of the FOI Act, the court of appeals ignored the broad statutory nondisclosure policy expressed in the Regulations under Section 6103 promulgated by the President. Although letter rulings and technical advice memoranda share common attributes, the error of the court below is best demonstrated by separate analysis of each aspect of its decision. We now turn to a detailed discussion of the nature of the documents sought by respondents, each of which contains information either already reported on a return or related to items reported on a return.

#### 1. LETTER RULINGS

Letter rulings are written statements issued by the National Office of the Internal Revenue Service in response to a taxpayer's request for the Service to apply the tax law to a given set of facts. They are given with respect to both completed and prospective transactions. When the transaction is subsequently reported in a tax return, the auditing agent simply compares the information on the return with the facts in



the ruling. If there is no variance, the conclusion of the ruling will determine the tax treatment of the transaction.

The rulings program is of great assistance not only to the taxpaying public but also to the Internal Revenue Service in its administration of the tax laws. Each year, in response to formally submitted requests, the Internal Revenue Service issues approximately 40,000 letter rulings setting forth its opinion concerning the federal tax consequences of specific transactions which are either proposed or already executed. These rulings simplify the conduct of audits by identifying the facts which the agent must confirm. Moreover, since the rulings are issued by the National Office, the ruling program assures a degree of uniformity of treatment that could not be obtained if revenue agents throughout the country were to apply their unaided individual conclusions.<sup>13</sup>

A ruling is initiated by a taxpayer's written request. The request is required to set forth a complete statements of facts relating to the transaction. See Statement of Procedural Rules, Section 601.201(e) (2) (26 C.F.R.).<sup>14</sup> The letter ruling in reply consists of

<sup>13</sup> The ruling program has been described and appraised by a former Chief Counsel of the Internal Revenue Service and a former Commissioner. See Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 Taxes 756 (1965); Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service*, 20 N.Y.U. Institute on Federal Taxation 1 (1962).

<sup>14</sup> For an example of the detail required in a request for a ruling: *A Statement of Principles*, see Rev. Proc. 75-32, 1975-27 Int. Rev. Bull. 43, which prescribes the information required for a ruling under Section 337 of the Code.

a detailed recital of the relevant facts submitted by the taxpayer followed by the Service's conclusions. It is this recital of facts, both in the taxpayer's submission and in the Service's reply, that requires confidentiality with respect to these documents.

It is essential that the letter rulings set forth the facts submitted by the taxpayer, so that an auditing agent can corroborate the facts on which the ruling is based. Those facts, which constitute the same type of information contained in a tax return, require confidentiality just as much when submitted in a ruling request or contained in the ruling itself.

In concluding that the excise tax letter rulings were not covered by Exemption 3, the decision below followed a similar holding with respect to income tax letter rulings in *Tax Analysts & Advocates v. Internal Revenue Service*, *supra*, 505 F. 2d at 351-355. In that case, the court concluded that "letter rulings generated by the voluntary request of a taxpayer for tax advice from the IRS are beyond the scope of that which the Congress sought to protect under section 6103, that is, 'returns' filed under compulsion of law which contain information necessary to determine federal tax liability" (*id.* at 354 n. 1).

The court's distinction between voluntary and mandatory ruling requests for purposes of the disclosure issue involved in this case is unsound. Not all ruling requests are voluntary. There are several instances in which the Internal Revenue Code requires the issuance of a letter ruling as a condition of a particular tax result. For example, a ruling is required in connection with certain transactions involving foreign



corporations (Section 367), the transfer of appreciated securities to certain foreign entities (Section 1492), and the change of an accounting period (Section 442).<sup>15</sup> However, in many other cases, ruling requests may be voluntary but are submitted as a matter of practical necessity. Thus, for example, favorable treatment under Section 306(b)(4) of the Code turns on whether the Commissioner is satisfied that tax avoidance is not a principal purpose of the transaction. Similarly, if a transaction is of sufficient magnitude, minimal prudence will require the parties to seek the predictability of result that accompanies the issuance of a ruling.

But whether a ruling request is voluntary or mandatory under the Code, the significant fact for purposes of the nondisclosure policy of Section 6103 is that it contains information of the same character as that set forth in the taxpayer's completed return. A letter ruling sets forth a detailed statement of facts in the context of what is essentially an advance audit. Such a document necessarily includes confidential information relating to the taxpayer's profits, expenses, the nature of his business, and the like.

If a taxpayer submits to the Internal Revenue Service facts relevant to his tax liability before the final date for his return rather than on that date, or after, there is no reason why he should be deemed to have waived confidentiality. He has not explicitly done so, and he has no lesser interest in confidentiality (or the

<sup>15</sup> Other Code provisions requiring the issuance of a ruling as a condition to a particular tax consequence include Sections 446(e), 507(b), 514(b)(3)(A), 706(b), 4942(g)(2), and 4945(g).

public any greater interest in disclosure) with respect to facts communicated to the Service prior to the completion of the return than with respect to facts disclosed in the return or discovered by the Service thereafter. If the taxpayer submits information in advance of his return, which is of the same character as that submitted on his return, that submission falls within the broad definition of "return" under the Section 6103 Regulations. Accordingly, it is protected from disclosure under Section 6103.

Indeed, the court in *Tax Analysts* acknowledged (505 F. 2d at 354 n. 1) that a ruling involving a subsequently executed transaction required to be reported on a return would "relate" to a return within the meaning of the Presidential Regulations under Section 6103. But even with respect to a transaction that may not be executed, the requirement that the ruling recite the relevant facts makes it almost inevitable that such facts have been or will be reported in the taxpayer's return so as to "relate" to a return and warrant the application of the statutory nondisclosure rule. The privacy interest of the taxpayer in such information is precisely the same whether or not the contemplated transaction is executed.

Moreover, the free assistance furnished by the Internal Revenue Service to thousands of individual taxpayers who come to the offices of District Directors seeking assistance with the preparation of returns is essentially equivalent to letter rulings. Those taxpayers have no reason to anticipate that the information they give to the personnel assisting them in advance

of the completion and filing of the executed form<sup>16</sup> will be treated any less confidentially than information supplied on a subsequent audit.<sup>17</sup> Since these informal communications of information with respect to tax liability are entitled to confidentiality, the more formal communications of information embodied in requests for rulings, and the Service's replies, should equally be protected from disclosure under Section 6103 and the Regulations.

Finally, in this case, where respondents seek taxpayer submissions to the Internal Revenue Service and letter rulings involving manufacturer's excise taxes, there is a special reason why such documents should be immune from disclosure. Section 4216(b)(1) of the Code provides that the manufacturer's excise tax shall be computed upon a constructive sales price if the manufacturer sells at retail, on consignment, or at less than the fair market price unless through an arm's length transaction. If a sale is at retail, the tax is computed "on whichever of the following prices is the lower: (i) the price for which such article is sold, or (ii) the highest price for which such articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof, as *determined by the Secretary or his delegate*" (em-

<sup>16</sup> The Regulations cover this situation by providing that "information received orally or in writing" is included in the term "return." See Treasury Regulations, Section 301.6103(a)-1(a)(3)(i)(b).

<sup>17</sup> Compare Section 7216 of the Code (26 U.S.C. (Supp. IV)), which imposes the obligation of confidentiality upon commercial preparers of returns.

phasis added). T.D. 6355, 1959-1 Cum. Bull. 795, sets forth the rules, and the detailed information required, for obtaining such a constructive price determination by the Commissioner.

Since the taxpayer can obtain a determination of the amount on which his tax is to be computed only by supplying information to the Commissioner that does not appear upon the Manufacturer's Excise Tax Form 720 (see Respondents' Brief in Opposition, Appendix G 37), respondents' claim that the protections of Section 6103 are limited to the Form 720 would subject to disclosure confidential financial data which is essential to a determination of excise tax liability. The mere fact that such information submitted to the Service is not required to be set forth on the Form 720 should not subject it to public disclosure.

Finally, respondents' request for the Internal Revenue Service files with respect to a number of published Revenue Rulings suffers from the same defect as their request for letter rulings and technical advice memoranda. These files include correspondence, analysis, and submissions of fact with respect to determinations of constructive sales prices. Some of them (*e.g.*, Rev. Rul. 68-202, 1968-1 Cum. Bull. 477; Rev. Rul. 68-519, 1968-2 Cum. Bull. 513) involve constructive price determinations made under Section 4216(b)(1). While the very nature of such determinations would indicate that the underlying files would contain specific detailed financial data related to the determination of tax liability of particular taxpayers, we need not speculate whether this is the case. As the



affidavit of one of the Internal Revenue Service officials stated, with three exceptions, those files contain letter rulings or technical advice memoranda issued with respect to named taxpayers together with underlying correspondence (A. 46). Hence, if Exemption 3 bars disclosure of letter rulings and technical advice memoranda, it would similarly bar disclosure of the files containing such documents.<sup>18</sup>

Indeed, disclosure of such pricing determinations with respect to manufactured items would also appear to implicate 18 U.S.C. 1905. That statute prohibits an employee of the United States from disclosing information which "concerns or relates to \* \* \* processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association \* \* \*." However, for present purposes, it is sufficient that such materials are barred from disclosure as returns within the meaning of Section 6103 and the pertinent Regulations.

## 2. TECHNICAL ADVICE MEMORANDA

Technical advice memoranda are issued to a district director in response to his request for instructions from the National Office as to the correct tax treat-

<sup>18</sup> Section 6103 is similarly applicable to bar disclosure of the Internal Revenue Service's letter rulings indexing system sought by respondents. If that statute prohibits disclosure of letter rulings, it would appear to make confidential any material which would list the names of recipients of such rulings and synopses of their pertinent facts (see A. 12-13, 31, 43-44).

ment of a specific set of facts relating to a named taxpayer. Such requests arise either in connection with the audit of a return or consideration of a claim for refund. The reply from the National Office consists of two parts: (1) a transmittal memorandum containing information for the district director which cannot be disclosed to the taxpayers; and (2) a "technical advice memorandum," containing a detailed statement of facts followed by a discussion of those facts in light of the applicable law. A copy of the technical advice memorandum is generally furnished to the taxpayer. See Statement of Procedural Rules, Section 601.105(b)(5)(vi) (26 C.F.R.).

These two-part technical advice memoranda are prepared by the Internal Revenue Service in the context of the factual situation of a specific tax return or claim for refund and they necessarily contain information set forth in that return or claim. The response serves principally to instruct the district office on how to dispose of the case. See Statement of Procedural Rules, Section 601.105(b)(5)(i), (vi), and (viii) (26 C.F.R.). Since the Service prepares these memoranda as part of the process of audit of a specific tax return or the consideration of a claim for refund, they necessarily contain and concern the information set forth in the return and claim. They are "reports \* \* \* relating to \* \* \* ['\* \* \* returns \* \* \* filed by \* \* \* the taxpayer \* \* \*']" within the meaning of the Regulation. The fact that such information is also set forth in a separate document known as a technical advice memorandum does not justify its public dis-



closure any more than a revenue agent's report of his audit of a taxpayer could be disclosed to a person other than the taxpayer or his authorized representative. As the District of Columbia Circuit ruled in *Tax Analysts & Advocates v. Internal Revenue Service*, *supra*, 505 F. 2d at 355, "Technical advice memoranda deal directly with information contained in 'returns made with respect to taxes' and are a part of the process by which tax determinations are made and, thus, 'specifically exempted from disclosure by statute.'"

The court below attempted to distinguish *Tax Analysts* on the ground that "the [district court's] order here most carefully limits disclosure to 'those portions of responses to Technical Advice requests that are or were intended for issuance to taxpayers'" (Pet. App. B 21A; A. 84). But the court's distinction suffers from two critical infirmities.

First, the injunctive orders in both cases are identical in requiring only the disclosure of the second part of the technical advice memorandum, *viz.*, the part of the memorandum constituting the Service's audit determination. See *Tax Analysts & Advocates v. Internal Revenue Service*, 362 F. Supp. 1298, 1310 (D.D.C.). Second, the court's statement that such documents are "intended for issuance to taxpayers" misapprehends the nature of the technical advice procedure.

Because the content of the technical advice memorandum is so closely related to the previously filed return, it is the practice of the Service to furnish the

affected taxpayer with a copy of its memorandum covering the audit determination (see Statement of Procedural Rules, Section 601.105(b)(5)(vi)(e)). However, this practice cannot justify the third-party disclosure approved by the court of appeals. The taxpayer is necessarily privy to the information reported in his own tax return; that knowledge, however, is a far cry from making that information available to the general public. It would indeed be a travesty upon the confidentiality principle of Section 6103 to reason that since a taxpayer may be made aware of Service conclusions with respect to his own return, the information giving rise to those conclusions, or the conclusions themselves, should be made public under the FOI Act.

Finally, the furnishing of a copy of the return of a taxpayer to the taxpayer himself is expressly authorized by Section 301.6103(a)-1(c)(1)(ii) of the Presidential Regulations. Thus, the Service's practice of furnishing the affected taxpayer with a copy of the audit determination of the technical advice memorandum does not breach the nondisclosure rule of Section 6103.

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In summary, both the letter rulings and technical advice memoranda sought by respondents meet the broad definition of "return" under the Section 6103 Regulations. Just as a technical advice memorandum incorporates information from a tax return in the context of a present audit, a letter ruling sets forth facts in the context of an advance audit. The substance of both documents is confidential information submitted

to the Internal Revenue Service by the taxpayer in connection with its determination of his tax liability. By virtue of Section 6103, Exemption 3 therefore bars the disclosure of these documents.

4. Apart from the terms of Section 6103 and its Regulations, there are other indications that Exemption 3 is applicable to the documents sought in this suit. In order to effectuate the policy reflected in Exemption 3 of the FOI Act to continue the effectiveness of all of the statutes by which Congress had protected the confidentiality of various categories of government documents, Congress intended to protect all groups of documents to which the agencies had applied their nondisclosure statutes. Thus, when Congress in Exemption 3 continued the effectiveness of Section 6103 of the Code, it necessarily intended to include the administrative interpretations of the reach of that section. Those interpretations, like the determination of the Federal Aviation Administration in *Robertson* that the particular reports there involved should be kept confidential, are representative of the type of agency practice formulated in the light of experience that Congress intended to adopt and preserve when it provided for confidential treatment of material "specifically exempted from disclosure by statute."

It has been the consistent view and practice of the Executive Branch for more than 50 years, of which Congress has been made aware, that the term "return" in Section 6103 includes documents of the type of

which respondents seek disclosure.<sup>19</sup> Congress intended Exemption 3 to cover those documents.

Even beyond its awareness of published regulations and rulings, Congress on several occasions has been informed that the Internal Revenue Service regularly withheld from public disclosure documents of the type respondents seek. See Monograph of the Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 10, 77th Cong., 1st Sess., Part 9, pp. 32, n.

<sup>19</sup> Regulations promulgated in 1920 provided that written statements filed with the Commissioner designed to be supplemental to and become part of a return were to be treated as returns. T.D. 2961, 2 Cum. Bull. 250. In 1938, the Regulations were expanded to provide the Commissioner with discretion to treat "other records and reports which contain information included or required by statute to be included in the return" as returns in cases where returns were open to inspection. T.D. 4873, 1938-2 Cum. Bull. 261, 268. In 1961, the Commissioner was given discretion to define such materials as returns, whether or not the filed return was open to inspection. T.D. 6543, 1961-1 Cum. Bull. 671, 673. The more detailed definition in the current Regulations was promulgated in 1972 to reflect existing practice and to remove from the Commissioner the discretion to determine which materials should be treated as returns. T.D. 7162, 1972-1 Cum. Bull. 381.

Moreover, the Commissioner has interpreted the term "return" with the same functional breadth in published rulings. See O. 879, 1 Cum. Bull. 262 (1919) (ownership certificates deemed returns); I.T. 1902, III-1 Cum. Bull. 196 (1924) (oil depletion allowance data sheets deemed returns); I.T. 2645, XI-2 Cum. Bull. 102 (1932) (claim for refund deemed return); I.T. 3826, 1946-2 Cum. Bull. 53 (employee's form W-2 deemed return). See also Rev. Rul. 229, 1953-2 Cum. Bull. 152, 154, and Rev. Proc. 62-9, 1962-1 Cum. Bull. 432, 436, which contain the Service's instructions to district offices regarding which documents were to be made available in addition to filed forms where returns were open to inspection.



126, 66-69 (1941); Hearings on S. 1666 and 1663 (in part) before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess., pp. 179-187 (1963). Finally, during the 1972 hearings conducted by a House Subcommittee on the Administration of the Freedom of Information Act, the Internal Revenue Service restated its view that Sections 6103 and 7213 of the Internal Revenue Code and 18 U.S.C. 1905 prohibited disclosure of letter rulings and technical advice memoranda.<sup>20</sup> Not only did this declaration go unchallenged, but in reporting its findings to the full House later in 1972, the subcommittee stated with reference to the Internal Revenue Service that "It should be noted that much tax data is exempt from disclosure by law." H.R. Rep. No. 92-1419, 92d Cong., 2d Sess., p. 34 (1972).

Indeed, the current Regulations under Section 6103, which broadly define "return" in a manner consistent with the confidentiality principle embodied in the statute, were adopted prior to the Internal Revenue Service's submission to the House subcommittee and the publication of the subcommittee report. Under these circumstances, the Court's observation in *Administrator, Federal Aviation Administration v. Robertson*, *supra*, 422 U.S. at 267, is particularly relevant here—

<sup>20</sup> See Hearings on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act, before a Subcommittee of the House Committee on Government Operations, 92d Cong., 2d Sess., Part 6, pp. 2044, 2046 (1972).

It is not insignificant that \* \* \* [the] overall scrutiny of the [FOI] Act in 1972 brought no change in Exemption 3. Indeed, when Congress amended the Freedom of Information Act in 1974, it reaffirmed the continued vitality of this particular exemption, covering statutes vesting in the agencies wide authority.

#### CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

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MARCH 1976.



## APPENDIX

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5 U.S.C. (1970 ED. AND SUPP. IV) 552 [AS AMENDED BY SECTIONS 1(b)(1) AND 2(c), PUB. L. 93-502, 93D CONG., 2D SESS., 88 STAT. 1561, 1564]. PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS

(a) Each agency shall make available to the public information as follows:

\* \* \* \* \*

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; \* \* \*

\* \* \* \* \*

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

\* \* \* \* \*

(b) This section does not apply to matters that are—

\* \* \* \* \*

(3) specifically exempted from disclosure by statute;

\* \* \* \*

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

\* \* \* \*

18 U.S.C.:

§ 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

INTERNAL REVENUE CODE OF 1954, AS AMENDED (26 U.S.C.):

SEC. 6103. PUBLICITY OF RETURNS AND DISCLOSURE OF INFORMATION AS TO PERSONS FILING INCOME TAX RETURNS.

(a) *Public record and inspection*—

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, subchapter B of chapter 37, and chapter 41, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person, a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Secretary or his delegate. The Secretary or his delegate may prescribe a reasonable fee for furnishing such copy.

\* \* \* \*

SEC. 7213. UNAUTHORIZED DISCLOSURE OF INFORMATION.

(a) *Income Returns*.—

(1) *Federal employees and other persons*.—

It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provisions shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

(2) *State employees.*—Any officer, employee, or agent of any State or political subdivision, who divulges (except as authorized in section 6103(b), or when called upon to testify in any judicial or administrative proceeding to which the State or political subdivision, or such State or local official, body, or commission, as such, is a party), or who makes known to any person in any manner whatever not provided by law, any information acquired by him through an inspection permitted him or another under sec-

tion 6103(b), or who permits any income return or copy thereof or any book containing any abstract or particulars thereof, or any other information, acquired by him through an inspection permitted him or another under section 6103(b), to be seen or examined by any person except as provided by law, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(3) *Shareholders.*—Any shareholder who pursuant to the provisions of section 6103(c) is allowed to examine the return of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any such return, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(b) *Disclosure of Operations of Manufacturer or Producer.*—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dis-



missed from office or discharged from employment.

(c) *Offenses Relating to Reproduction of Documents.*—Any person who uses any film or photoimpression, or reproduction therefrom, or who discloses any information contained in any such film, photoimpression, or reproduction, in violation of any provision of the regulations prescribed pursuant to section 7513(b), shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both.

(d) *Disclosure by Certain Delegates of Secretary.*—All provisions of law relating to the disclosure of information, and all provisions of law relating to penalties for unauthorized disclosure of information, which are applicable in respect of any function under this title when performed by an officer or employee of the Treasury Department are likewise applicable in respect of such function when performed by any person who is a "delegate" within the meaning of section 7701(a)(12)(B).

(e) *Cross Reference.*—

(1) *Returns of federal unemployment tax.*—

For special provisions applicable to returns of tax under chapter 23 (relating to Federal Unemployment Tax), see section 6106.

(2) *Penalties for disclosure of confidential information.*—

For penalties for disclosure of confidential information by any officer or employee of the United States or any department or agency thereof, see 18 U.S.C. 1905.

# TREASURY REGULATIONS ON PROCEDURE AND ADMINISTRATION (26 C.F.R.):

§ 301.6103(a)-1. *Inspection of returns by certain classes of persons and State and Federal government establishments pursuant to Executive order.* (a) *In general*—(1) *Authority.* The President is authorized by subsection (a) of section 6103 to open to public examination and inspection returns in respect of the taxes described in paragraphs (1) and (2) of such subsection. In addition, section 6106 provides that returns in respect of the tax described therein (unemployment tax imposed by chapter 23 of the Code) shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns of the taxes described in section 6103, except that subsections (a)(2) and (b)(2) of section 6103, and subsection (a)(2) of section 7213 (relating to unauthorized disclosure of information) shall not apply.

\* \* \* \* \*

(3) *Terms used*—(i) *Return.* For purposes of section 6103(a), the term "return" includes—  
(a) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and (b) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (a) of this subdivision. \* \* \*

MAR 30 1976

MICHAEL RODAK, JR., CLERK

**No. 75-679**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1975**

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**INTERNAL REVENUE SERVICE, PETITIONER**

**v.**

**FRUEHAUF CORPORATION, ET AL., RESPONDENTS**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT**

---

**BRIEF FOR THE RESPONDENTS**

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# In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-679

INTERNAL REVENUE SERVICE, PETITIONER

v.

FRUEHAUF CORPORATION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR THE RESPONDENTS

### QUESTIONS PRESENTED

#### I

WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT EXCISE TAX PRIVATE LETTER RULINGS, TECHNICAL ADVICE MEMORANDA, INDEX-DIGEST CARDS AND CERTAIN FILES, CORRESPONDENCE AND COMMUNICATIONS DO NOT CONSTITUTE TAX "RETURNS MADE" UNDER SECTION 6103 (a)(2) OF THE INTERNAL REVENUE CODE AND, THEREFORE, ARE NOT MATTERS SPECIFICALLY EXEMPT UNDER 5 U.S.C. 552(b)(3)?

#### II

IF A RECORD, REQUESTED UNDER THE FREEDOM OF INFORMATION ACT, IS A PART OF OR SUPPLEMENTAL TO AN EXCISE TAX RETURN, SHOULD THE REASONABLY SEGREGABLE PORTION THEREOF BE PROVIDED TO THE REQUESTING PERSON AFTER DELETION OF THE EXEMPT PORTIONS?

### STATEMENT OF THE CASE

The Internal Revenue Service, Petitioner herein (hereinafter IRS), seeks to set aside an order (A. 52) of the district court and affirmed by the court of appeals (A. 78), requiring it to deliver to respondents the following records:

1. Certain manufacturers excise tax private letter rulings;
2. Certain technical advice memoranda issued to excise taxpayers;
3. Files including correspondence, analysis, and submissions of fact applicable to the issuance of certain enumerated published excise tax revenue rulings;
5. Communications with respect to excise tax private letter rulings received by the IRS from persons outside the Executive Branch of the Government.

Respondents, after exhausting their administrative remedies, brought an action in the district court (A. 8) under the Freedom of Information Act (hereinafter FOIA or the Act), 5 U.S.C. § 552 (Appendix, *infra*, 73-75) to require the IRS to make available all of the documents set out in the order of the district court.

Crucial to the decision of this case is an understanding of the function and nature of the documents in issue in the context of the administrative process which generated them.

Liability for the manufacturers excise tax arises at the time of sale, and such tax is generally passed on at that time by the manufacturer to his customer.

Therefore, he must know whether an item is taxable and its proper tax base. When an excise tax issue is in dispute, if agreement cannot be reached with the IRS, the taxpayer must pay a tax and then sue for a refund in either the district court or the Court of Claims. The Tax Court has no jurisdiction over excise taxes, and consequently, there is a more limited body of excise tax case law. For these reasons, final opinions and interpretations of the excise tax law by the IRS contained in private letter rulings and technical advice memoranda should be disclosed since they constitute a body of secret law administratively relied upon by the IRS in its disposition of excise tax issues.

### A. Description of Information Requested

#### 1. The Private Letter Ruling System

A "ruling" is a written statement issued only by the National Office of the IRS to the taxpayer or his authorized representative that interprets and applies the tax law to a specific set of facts. The issuance of rulings is under the general supervision of the Assistant Commissioner (Technical)<sup>1</sup> (A. 39). Such rulings are generally referenced to as "private letter rulings."

<sup>1</sup> The Assistant Commissioner (Technical) acts as the principal assistant to the Commissioner in providing basic principles and rules for the uniform interpretation and application of the Federal tax laws. Internal Revenue Manual (hereinafter I.R.M. or Manual) (11) 111, Appendix, *infra*, 78).

Part (11)631(1) of the I.R.M. provides:

The Technical organization is charged with the interpretation of the provisions of the Internal Revenue Code, regulations, and related statutes with respect to all Federal taxes, other than alcohol, tobacco and certain firearms taxes.

(a) The issuance of rulings by the Technical organization has been assigned to the following:

There are no instances in which the Internal Revenue Code of 1954 (hereinafter I.R.C. or Code) requires the issuance of a letter ruling as a condition of a particular manufacturers excise tax result.

However, any person may request an excise tax ruling. In excise tax matters, except excise taxes imposed under Chapter 42 of the I.R.C., the National Office issues rulings with respect to both prospective and completed transactions either before or after the return is filed (I.R.M. (11)616.2(3), Appendix, *infra*, 82-83). The function of an excise tax private letter ruling is to advise the requesting taxpayer regarding the treatment he may expect from IRS in the circumstances specified in the ruling (A. 28 and 31). A private letter ruling to a taxpayer should resolve fully all issues in language as nontechnical as the circumstances will permit, be technically accurate, legally sound, as concise as is feasible without sacrificing clarity and should contain an explanation of the rea-

• • • •  
2. Miscellaneous and Special Provisions Tax Division

• • • •

d. Excise Tax Branch;

• • • •

(b) The above Branches issue ruling or advisory memorandums as to the position of the Service that may be used as the basis for a determination of the tax consequences of specifically described transactions or other acts. The areas in which these Branches have jurisdiction are specified in I.R.M. 1113.9.

(c) The Technical Services Branch, Tax Forms and Publication Division, is authorized to reply to inquiries from taxpayers requesting general technical information.

sons for the conclusions reached if the ruling is adverse (I.R.M. (11)633.3(5), Appendix, *infra*, 83-84).

The IRS, since 1954, has issued approximately 10,000 so-called "reference" rulings and approximately 30,000 "routine" rulings in the area of manufacturers excise tax, but the IRS has selected, on the average, fewer than 175 of these rulings annually for publication in the Internal Revenue Bulletin (A. 28, 31 and 32).

For many years the IRS has used private letter rulings as legal precedent in the interpretation of the federal tax laws. As early as 1940, a committee headed by then Attorney General and former Chief Counsel of the IRS, Robert H. Jackson, found that unpublished private letter rulings

are given virtually as much weight as published rulings despite the statement on the cover of the Internal Revenue Bulletin that "no unpublished ruling or decision will be cited or relied upon by any officer or employee of the Bureau \* \* \* as a precedent in the disposition of other cases." Monograph of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 10, 77th Cong., 1st Sess. 68 (1941).

In 1961, Assistant Commissioner (Technical) Harold T. Swartz of the IRS affirmed this use (Supp. App. 124, 125, 175, 181).

Prior to 1967, private letter rulings were designated as "precedent" or "non-precedent." In 1967, the year the FOIA became effective, the names of the rulings were changed to "reference" and "routine," respectively (A. 32). John F. Simmons, Chief of the Manual and Field Conference Section, Technical Service



Branch, Technical Publications and Service Division of the IRS, testified on deposition in *Tax Analysts and Advocates v. Internal Revenue Service*, 362 F. Supp. 1298 (D.D.C., 1973), that the reason for the change was IRS believed that under the FOIA "precedent had to be published," and so "[w]e just changed the name of it." (Supp. App. 346)

The employees of the IRS who prepare private letter rulings are called Tax Law Specialists. They use, read and refer to previously issued private letter rulings, as well as the index-digest card files, in connection with their work of preparing private letter rulings (A. 30). These employees are responsible for determining which of the private letter rulings are to be classified as "reference" or as "routine" (A. 28 and 31).

## **2. The Technical Advice Memoranda Procedure**

A technical advice memorandum is also prepared only in the National Office of the IRS by the Assistant Commissioner (Technical) (I.R.M. (11)712, Appendix, *infra*, 84). Like a private letter ruling, it is an interpretation and application of internal revenue laws, related statutes and regulations to a specific set of facts. Unlike a private letter ruling, the request originates from a district office of the IRS (I.R.M. (11)713, Appendix, *infra*, 84).

During the course of an excise tax examination, whether the audit of a return or a claim for refund, a taxpayer or his representative may request that a legal issue be referred to the Assistant Commissioner (Technical) of the National Office for technical advice on the grounds that a lack of uniformity exists as to the disposition of the issue or that the issue is

so unusual or complex as to warrant consideration (I.R.M. (11)721(2)(a), Appendix, *infra*, 85). If such a request is made, the examining officer or conferee initiates the action by furnishing the taxpayer with a copy of the statement of the pertinent facts and the question or questions proposed for submission. The taxpayer may submit a statement explaining his position on the issues, citing precedents that will bear upon the case.

The National Office of the IRS controls the issuance or nonissuance of requested technical advice memoranda. If an advice memorandum is issued, a copy is furnished to the taxpayer after it has been adopted by the District Director (I.R.M. (11)722.7(1)(a), Appendix, *infra*, 85; A. 41).

A form for a technical advice memorandum issued by the National Office is set out in the Appendix, *infra*, 94.

Thus, while the procedures leading to the issuance of excise tax private letter rulings and technical advice memoranda may differ, they are identical in their nature and legal effect. Both are final opinions and interpretations of law on specific statements of facts which have been adopted by the National Office of the IRS and are not published in the Federal Register.

## **3. Index-Digest Card System**

All of the private letter rulings and technical advice memoranda, regardless of their classification, are included in chronologic files, beginning in July, 1953. These files are not maintained by subject matter or Code section; however, the IRS maintains sets of cards in alphabetical order that separately index all

such files by taxpayer name and date. These cards are maintained, beginning in 1954, in sets of approximately five-year blocks (A. 31 and 43).

Reference index-digest cards involving excise tax are filed under index headings based on subject matter (A. 31 and 43), while routine index-digest cards involving excise tax are filed by case name. The typical reference index-digest card contains the taxpayer's name, the Code section involved, the date, a summary or digest of the issue involved and the decision reached (much like a "headnote"), an indication of the branch that issued the ruling and whether publication was recommended (I.R.M. (11) 244.2, Appendix, *infra*, 79-80).

Each index-digest card identifies the source document (A. 31 and 43). Where the source document is contained in a reference file a researcher may obtain it. The purpose of the cards is "to simplify research into a wide variety of source documents to determine the treatment in the documents of a *particular* issue, or *provision of law*." (Emphasis added.) (I.R.M. (11)242. The index-digest cards are maintained "as an aid in researching Federal tax questions," and "to utilize prior research and to ascertain what interpretations have been made in other cases" (I.R.M. (11) 244.2, Appendix, *infra*, 79-80).

#### 4. Documents Underlying Certain Published Revenue Rulings

Respondents have requested and the district court ordered production of the files including correspondence, analysis and submissions of fact applicable to the issuance of 23 specifically enumerated published

excise tax revenue rulings. The IRS offered no testimony, affidavits or evidence that such records were not available (A. 11, 12, 55 and 56). These published revenue rulings are all devoted to determinations of whether certain articles are subject to the manufacturers excise tax under Section 4061 and determinations of price or constructive price under Section 4216 of the I.R.C. (Pet. Br. 5, n. 2).

All or some of the following documents are contained in an underlying revenue ruling file:<sup>2</sup>

1. A carbon copy of the ruling;
2. The request for the ruling;
3. A Rulings Publication and Distribution Memorandum which states whether the ruling should be digested or submitted for publication with reasons and citations to Treasury regulations or other unpublished rulings. It also contains a statement as to whether the ruling revokes or modifies any published rulings or confidential unpublished rulings (CUR's) that have precedent value;
4. A digest of the letter ruling, which is placed in the subject file and sent to field offices of the IRS along with a copy of the ruling;
5. General Counsel's Memorandum (GCM), which is a legal opinion of the Chief Counsel of the IRS on the legal issue involved in the ruling;
6. A request for reconsideration of the ruling as issued and a reconsideration and modification request to Chief Counsel;

<sup>2</sup> Deposition of Harold T. Swartz, Assistant Commissioner (Technical) in *Allstate Insurance Co. v. United States*, 329 F.2d 346 (C.A. 7th, 1964); Supp. App. 115-165.



7. Correspondence between the IRS and the requesting taxpayer or his representative (A. 46).

**5. Communications With Respect To  
Private Letter Rulings**

Respondents also requested and the district court ordered the production of communications (including letters, conference memoranda and memoranda of telephone conversations) with respect to the requested excise tax private letter rulings, received by the IRS from persons outside the Executive Branch of the United States Government (including, without limitation, members of Congress, Congressional staff members and persons acting on behalf of the parties seeking rulings), together with the responses of the IRS to these outside communications (A. 12 and 56).

The IRS has argued generally that all records requested by respondents contain information which is either part of or related to returns filed by particular taxpayers (Pet. Br. 2). At trial, the IRS offered no evidence as to the information contained in these records and has not specifically discussed this request either in its brief in the court of appeals or this Court other than to state that if private letter rulings and technical advice memoranda are exempt under Section 6103, then the files pertaining to published letter rulings and the letter ruling indexing system are exempt (Pet. Br. 31 and 32).

**B. Summary of Proceedings in This Case**

Respondents are defendants in a criminal excise tax case in the United States District Court for the Eastern District of Michigan. In substance, the one count indictment charged that respondents, over a

nine year period from October 1, 1956 to December 31, 1965, had conspired to illegally lower the excise tax base on articles sold by respondent corporation, principally highway trailers. Contrary to the brief of the IRS at page 2, respondent corporation does not manufacture trucks. It paid approximately \$96,000,000 in federal excise tax upon its sales for the period in question, whereas the indictment alleged that approximately \$108,000,000 in tax was due and owing on these sales for that period.

On October 11, 1972, respondents, as defendants in said criminal action, in order to obtain the above described records which they considered vital to their defense, filed a motion for discovery and inspection and a motion for disclosure of exculpatory information.

In its memorandum and orders, dated June 21, 1973, the district court in denying these motions stated as follows:

*In the defendants' Motion for Disclosure of Exculpatory Information the defendants have made a request similar to that contained in paragraph 6 of their Motion for Discovery and Inspection. In its response the Government concedes that under Sec. 552(a)(3) of 5 U.S.C. (the Freedom of Information Act) the Internal Revenue Service records (except privileged or confidential trade secrets and commercial or financial information obtained from a taxpayer) are available to any person under proper request for identifiable records, and refers Defendants to 26 C.F.R. Sec. 601.702(e). (Emphasis added.)*

Promptly thereafter, on June 26, 1973, respondents, in reliance upon the above referenced concessions



made by government counsel to the court, submitted a written request to the IRS to inspect and copy certain identifiable excise tax records as provided for in the FOIA.

Nearly one month later, on July 24, 1973, the IRS denied respondents' requests *in toto*, citing as authority 5 U.S.C. § 552(b)(3), (4), (5) and (7), (hereinafter Exemptions 3, 4, 5 and 7). Just six days later, on July 30, 1973, respondents appealed the July 24, 1973 denial to the Commissioner of Internal Revenue. Some three weeks later, on August 22, 1973, respondents' appeal was denied, and thus respondents had exhausted their administrative remedies. (Appendix, *infra*, 100, 113).

On September 14, 1973, this action was filed and respondents moved for a preliminary injunction. The IRS, in turn, moved for summary judgment claiming that all of the requested records were exempt from disclosure under Exception 3 of the FOIA, because of Section 6103 of the I.R.C. (A. 8, 33).

Respondents requested and received from the IRS certain admissions and answers to interrogatories (A. 27-32, 34-38). The IRS, in turn, requested and received from respondents answers to interrogatories.

The district court received evidence and heard arguments. The IRS argued Exemptions 3, 4, 5 and 7 as well as equitable considerations for denying disclosure of the requested records. At the trial, the IRS called no witnesses and presented no evidence as to the contents of any records requested by respondents or whether any such records had been filed as parts of any tax returns. It did submit three affidavits

generally discussing the system by which rulings are issued (A. 39-46). Respondents introduced into evidence a blank copy of an excise tax return (Form 720, Appendix, *infra*, 96-99) and parts of the I.R.M.

On January 11, 1974, the district court denied the motion of the IRS, ruling that respondents were entitled to disclosure of all requested records (A. 47-51) and entered an order thereon on January 30, 1974 (A. 52-57).

On February 4, 1974, the IRS filed an application for a stay pending appeal, and on February 7, 1974, the IRS filed a motion to alter or amend the January 30, 1974 order. The district court denied both motions on March 20, 1974. The IRS timely filed its notice of appeal on March 21, 1974. On April 9, 1974, the court of appeals, on stipulation of the parties to expedite the appeal, entered an order providing that until a final decision of the appeal of the matter by the court, all records and information referred to in the injunctive order of the district court need not be disclosed, but that the IRS must nevertheless continue to compile the requested information at the expense of respondent corporation (A. 3, 5). On June 9, 1975, the court of appeals affirmed (A. 6, 78-90). On January 12, 1976, this Court granted the petition of the IRS for writ of certiorari (A. 102).

### C. Public Use of and Reliance on Private Letter Rulings

It has long been an established practice of both the courts and the IRS to utilize private letter rulings as evidence of the administrative practices of the IRS and its interpretations of the I.R.C.

In *Allstate Insurance Co. v. United States*, 329 F. 2d 346 (C.A. 7th, 1964), the IRS placed in evidence as exhibits a number of private letter rulings, requests for rulings and a request for reconsideration of ruling, issued over a 12 year period to show the existence of an unpublished administrative practice. In addition, the IRS read into the record a portion of a retained copy of a technical advice memorandum held by the IRS. The government relied on this administrative practice to show that Allstate and its parent corporation, Sears, Roebuck & Company, would have secured a ruling allowing them to file consolidated income tax returns had they requested one. They were not eligible, under Treasury regulations in existence at that time, to file consolidated income tax returns. The documents placed in evidence were complete and intact except for partial deletion of the names of the taxpayers and their representatives. Documents contained in the underlying ruling files were produced by the IRS and offered in evidence by Allstate.

In *Hanover Bank v. Commissioner*, this Court, set forth in a footnote, a private letter ruling issued by the IRS. 369 U.S. 672, 686-7, n. 20 (1962). In referring to it, the Court stated:

... although the petitioners are not entitled to rely upon unpublished private rulings which were not issued specifically to them, such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws. And, because the Commissioner ruled, in letters addressed to taxpayers requesting them, that amortization with reference to a special call price was proper under the statute, we have further evidence that our

construction of allowable bond premium amortization is compelled by the language of the statute. 369 U.S. 692, 686-7 (Footnotes omitted.)

The following argument was submitted on brief by the government to the district court in *Allstate Insurance Co. v. United States*, Supp. App. :

It would certainly be wrong to say that such unpublished policies can never be proved in a court of law, because eminent authorities on federal taxation have pointed out that unpublished Service practice may often be crucial to the resolution of a tax problem. For example, Mr. Erwin Griswold, now Dean of the Harvard Law School, has stated unequivocally that "Treasury construction and practice \* \* \* \* may even appear, and quite plainly, in certain types of cases, *where no public ruling has been issued at all.*" Griswold, A Summary of the Regulations Problem, 54 Harv. L. Rev. 398, 417 (1941). (Emphasis added.) The Dean then goes on to say (Op. Ct. p. 418):

Where the practice clearly appears, and where it has in fact been long continued, it should be given effect in the interests of sound tax administration. There should be no rule limiting the effect of administrative construction in all cases to formal regulations and Treasury decisions.

#### SUMMARY OF ARGUMENT

The lower courts in this case have found that exercise tax private letter rulings and technical advice memoranda constitute final opinions and interpretations of the IRS within the meaning of Section 552(a)(2)(A) and (B) of the FOIA. They have also found that index-digest cards, as well as files including correspondence, analysis and submissions of fact applica-



ble to the issuance of certain enumerated published excise tax revenue rulings, and communications with respect to excise tax private letter rulings received by the IRS from persons outside the executive branch of the government are identifiable records under Section 552(a)(3). The IRS has not argued to the contrary, and therefore, it must be concluded that it concedes respondents have met the first tests required by the FOIA under subsection (a) thereof.

Respondents, in the Statement of the Case, have set out definitions of excise tax private letter rulings and technical advice memoranda, their contents and the methods of obtaining them. Index-digest cards are also described. The facts as set out were summarized from the Technical part of the I.R.M. Nowhere in the Manual nor in the IRS regulations are any of these records specifically described or referred to as "returns." If the IRS had, prior to this case, considered such records to be returns, it is reasonable to assume it would have so stated in its Manual.

The IRS in its brief contends that the requested excise tax records are specifically exempt from disclosure under Exemption 3 of the FOIA. This exemption requires that the IRS must prove that there is a statute which specifically exempts such records from disclosure. In its "Question Presented" the IRS relies only on Section 6103 of the I.R.C. as authority for refusing disclosure.

Where an agency attempts to bar disclosure under one of the exemptions of the FOIA, "the burden is on the agency [IRS] to sustain its action." See 5 U.S.C. § 552 (a)(4)(B). In view of this statutory requirement, the IRS must prove that the requested

records constitute "returns made" under Section 6103 (a)(2) in order to come under Exemption 3.

The FOIA was amended in 1974 to clarify and expand the disclosure policies formulated by Congress when the Act was originally adopted in 1966. By the 1974 amendments Congress has stated that not only must those records which are not exempt be disclosed but "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt under this subsection" must also be disclosed (5 U.S.C. § 552(b)). These arguments are addressed separately under Argument II of respondents' brief at pp. 59-70.

Respondents do not contend that excise tax returns made and filed with the IRS must be disclosed. Rather they contend, and the lower courts held, that the requested records do not constitute "returns made" under Section 6103 and, therefore, do not come within Exemption 3.

The legislative history of the FOIA indicates that an agency is to disclose records unless they are explicitly allowed to be kept secret by one of the exemptions under subsection (b) therein.

This Court has ruled that the exemption requirements of the FOIA must be construed narrowly. To date ~~this~~ Court has interpreted Exemption 3 in only one opinion, that being *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975).

Unlike the respondents in *Robertson*, the respondents herein do not contend that the FOIA repealed Section 6103 or any other exemption statutes. This Court therein noted that the Civil Aeronautics Board had brought Section 1104 of the Federal Aviation Act



and its agency interpretation thereof to the attention of Congress. It stated that no question was raised or challenge made to the agency view that such provision and the agency's interpretation were encompassed within Exemption 3. The situation in the case at bar is to the contrary. When the IRS brought Section 6103 to the attention of the Senate at the Subcommittee Hearings of 1963 and 1965, it expressed its interpretation that this Section did not encompass private letter rulings and technical advice memoranda. No question was raised or challenge made to the IRS view that the impact of Exemption 3 did not apply to such records. The IRS is now attempting to reject its own interpretation of Section 6103 which Congress recognized as not including private letter rulings and technical advice memoranda within Exemption 3. In addition, this Court, in *Robertson*, found that Section 1104 gave the Administrator or Board broad discretion, in nature and scope, to withhold disclosure. Section 6103 is much more narrow and only permits the IRS to withhold "returns made" from disclosure. The records requested by respondents have been held by the lower courts in this case not to constitute "returns made."

Section 6103 specifically refers only to "returns made" and does not refer to or even intimate that the private letter rulings, technical advice memoranda, index-digest cards and other requested records come within the intent of that Section. Therefore, in order to sustain its refusal to disclose the records, the IRS now contends that they constitute "returns" "where such requested records contain information which is either part of or related to returns by particular taxpayers." (See IRS Question Presented, Pet. br. 2). It would appear that the IRS concedes that where the

record is not part of or related to a filed return it must be disclosed. Such would be the case where a taxpayer has requested an excise tax ruling inquiring whether a particular article is subject to the tax. If the IRS by private letter ruling advises that it is exempt, then the article is not taxable and sales thereof are not taken into consideration when computing the tax liability appearing on a return. The IRS has offered no evidence as to the contents of the requested records.

The IRS makes the unsupported statement that the history of Section 6103 shows that Congress intended all "tax information" to be nondisclosable. Only a cursory review is made by it of the Congressional history, undoubtedly because there is a dearth of Congressional records covering the subject matter. The words "returns" and "returns made" have been used in the tax statutes from 1870 to the present. Congress has not attempted to broaden the term "returns" beyond its commonly accepted meaning. Rather, it has left it to the courts to interpret the meaning of the term and they have done so narrowly and strictly, not broadly as contended by the IRS.

Prior to page 20 of its brief, the IRS argues for "the confidentiality requirement with respect to tax returns made." (Pet. Br. 18) Commencing at page 20 it broadens its argument to cover the nondisclosure of "tax information" and finally, at page 21, "information furnished by taxpayers to the Treasury." There is no explanation for the progression from "tax returns made" to "tax information" to "information furnished by taxpayers to the Treasury." By such arbitrary progression the IRS attempts to encompass all of the requested records within the term

"return." There is neither Congressional nor judicial authority for this position.

The rulings program of the IRS came into existence approximately 38 years ago. Since it was not in existence when Congress first required the filing of returns, that body could not have intended rulings to be either part of a return or confidential as contended by the IRS.

When it suits its purpose the IRS makes public disclosure of private letter rulings. In *Allstate Insurance Company v. United States*, 329 F.2d 346 (C.A. 7, 1964), the IRS introduced such rulings into evidence to prove an unpublished administrative practice of the IRS. If it had then considered these rulings to be "returns" under Section 6103, then it would have been unlawful for the IRS to have made such disclosure. It follows that having made this disclosure it did not consider the rulings to constitute "returns."

Respondents contend Section 7213 of the I.R.C. and its legislative history support their contention that the requested documents do not constitute "returns." That Section prohibits disclosure of certain data set forth in "any income returns." It specifically refers to the nondisclosure of trade secrets and the amounts and sources of income, profits, losses and expenditures. Clearly Congress intended the definition of "returns" to be limited to such data. Nowhere in the statute is reference made to a restriction on disclosure of interpretations of law or final opinions of the IRS.

This Court and the lower courts have maintained a policy of narrowly defining the term "return." The leading case is *Florsheim Bros. Drygoods Co. v United States*, 280 U.S. 453, 457 (1930) wherein this Court

adopted the narrow definition of "return," i.e., "information requisite for an assessment of the tax." See also *Commissioner v. Lane Wells Co.*, 321 U.S. 219, 223 (1944). The courts have narrowly construed the term when interpreting Sections 6501, 6651 and 7213 of the IRC.

Until 1972, IRS regulations used a narrow definition of the word "return." It was only after the plaintiffs in *Tax Analysts & Advocates v. Internal Revenue Service*, 362 F. Supp. 1298 (D.D.C., 1973) filed a formal request for private letter rulings and technical advice memoranda in 1972 that the broad definition of the term was promulgated. Prior to 1961, the IRS confined its definition to records "designed to be supplemental to or to become a part of income returns." In that year, amended Treasury Regulations deleted the reference to "income." A comparison of its 1961 and 1972 regulations defining "returns" shows how far afield the IRS has gone in order to avoid disclosure of the records sought herein and to circumvent the clear intent of Congress under the FOIA.

The 1972 regulations of the IRS defining the term "returns" are not applicable inasmuch as they exceed statutory bounds. Pursuant to Section 6103, regulating the public disclosure of returns, the IRS has promulgated a regulation which it now contends prohibits disclosure of its interpretation of law. This Court has held that the IRS does not have the power to make law, for no such power can be delegated by Congress. It may only adopt regulations to carry into effect the will of Congress, and if they are unreasonable and plainly inconsistent with the statute, they cannot stand.

Former Assistant Commissioner (Technical) Harold T. Swartz, in a deposition in the *Allstate* case, testified



that private letter rulings establish precedent, are circulated to field offices and are always followed unless some consideration causes a change in position. A number of private letter rulings were offered into evidence by the IRS in that case to establish an unpublished administrative practice concerning consolidated tax returns.

Mr. G. d'Andelot Belin, the then General Counsel of the Treasury Department in testifying in 1963 before a subcommittee of the Senate Committee on the Judiciary pertaining to the FOIA, stated: "... we wish to repeat that the Treasury Department is not opposed to publicity for its rulings and decisions."

Disclosure of the requested records is necessary to avoid disparity in the treatment of taxpayers. There are relatively few cases interpreting manufacturers excise tax law since those subject to it are permitted to pass this tax on to the purchaser. Consequently, it is important to know prior to sale whether an article is taxable. Such knowledge is generally obtained through private letter rulings issued by the IRS. As a result one manufacturer may gain a competitive advantage over another by obtaining such a ruling and not disclosing its contents to competitors. Such rulings constitute final opinions and interpretations of the IRS and are subject to disclosure under the FOIA.

Even if the requested documents constitute "returns" within the meaning of Section 6103, nevertheless the 1974 amendments of Sections 552(a)(4)(B) and 552(b) of the FOIA require reasonably segregable portions of the records requested to be submitted to the court for in camera review. This Court, in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973),

invited Congress to clarify its intention as to whether the Act should be interpreted more broadly. After extensive Congressional hearings, during which the *Mink* case was repeatedly referred to, Congress not only revised Exemptions 1 and 7 but added a sentence at the end of subsection 552(b) which it specifically said was to apply to "all exemptions." The amendment to subsection 552(b) stated:

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

To date there are no reported cases interpreting this language; therefore, we must look to the Congressional hearings if further clarification is required. In the Senate debates it was clearly stated that courts may order disclosure of portions of files or records as well as entire files or records. The American Bar Association appeared during the hearings and advocated that agencies be permitted to separate exempt from non-exempt information in a particular record and make available the non-exempt information. The present Attorney General in a published 1974 Memorandum stated that the FOIA as amended required such a separation and disclosure of the non-exempt portion.

The 1974 amendments also broadened the in camera inspection and de novo review procedures and stated that they should be available under all exemptions.

Finally, it should be noted that IRS representatives appeared before these Congressional committees and urged that the Act not be broadened inasmuch as there would be made available to the public thousands of unpublished letter rulings which would place an ex-



pensive burden on the agency to delete names, addresses and identifying details. In spite of such statements Congress passed the broadening amendments. Clearly, it was the intent of Congress that the records sought by respondents be made available to the public in order to avoid the secret body of law principle so long advocated by the IRS. The order from which the IRS is appealing includes a provision for in camera inspection and the deletion of any matter found to be exempt under the FOIA.

## ARGUMENT

### INTRODUCTION

At the outset, it is important to note that 5 U.S.C. § 552 was amended in 1974 by Pub. L. 93-502, 93d Cong., 2d Sess., 88 Stat. 1561. This Court, in *NLRB v. Sears, Roebuck & Co.* stated, "any decision of the Exemption 7 issue in this case would have to be under the Act, as amended, *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975). . . ." 421 U.S. 132, 165 (1975). See also *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), n. 2. In view of the foregoing, this brief is written with reference to the FOIA presently in effect.

The background of the FOIA and its principal objectives are set forth fully in *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79-80 (1973), *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 12-13 (1974), and reaffirmed in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 136, and will only briefly be referred to herein.

It is the position of the IRS that certain records generated by it, such as excise tax private letter rul-

ings, technical advice memoranda, index-digest cards, and certain files, correspondence and communications pertaining to excise tax, are specifically exempt from disclosure by statute pursuant to Exemption 3, viz-Section 6103 of the I.R.C. and constitute "returns made with respect to" certain taxes provided therein. Respondents contend that such records are not specifically exempt by statute inasmuch as they do not constitute a "return" or any part thereof and that the IRS by amending its Regulations cannot adopt a definition of the word "return" not intended by Congress. Respondents further contend that even if any part of the requested records are part of or supplemental to an excise tax return, any reasonably segregable portion should be provided to respondents after deletion of the exempt portions provided by the 1974 amendment to Subsection (b) of the FOIA.

#### A. The Clear Mandate of the Freedom of Information Act Requires Disclosure in the Present Case

The primary purpose of the FOIA is to increase the citizen's access to governmental records. *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973); *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1 (1974); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); and *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975).

The legislative history of the FOIA clearly establishes that Congress recognized that the purpose of the Act was to establish a general philosophy of *full agency disclosures unless the information is exempted under clearly delineated statutory language*. See Senate Report No. 813, October 4, 1965, to accompany

Senate Bill 1160 (the FOIA) for a general discussion of the need to avoid secrecy by governmental agencies. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

In 1972 the House Committee on Government Operations stated:

When Congress passed the Freedom of Information Act, it issued a rule of government that all information with some valid exceptions was to be made available to the American people—no questions asked. The exceptions—intended to safeguard vital defense and state secrets, personal privacy, trade secrets and the like—were only permissive, not mandatory. When in doubt, the department or agency was supposed to lean toward disclosure, not withholding. H.R. Rep. 1419, 92d Cong., 2d Sess. 14 (1972).

**B. Excise Tax Private Letter Rulings and Technical Advice Memoranda Constitute Final Opinions as Well as Statements of Policy and Interpretations of Law Which Have Been Adopted by the Agency Within the Meaning of 5 U.S.C. § 552(a)(2)(A) and (B).**

As this Court has clearly stated in *NLRB v. Sears, Roebuck & Co.*:

Certain documents described in 5 U.S.C. § 552(a)(1) such as “rules of procedure” must be published in the Federal Register; others, including “final opinions . . . made in the adjudication of cases,” “statements of policy and interpretations which have been adopted by the agency,” and “instructions to staff that affect a member of the public,” described in 5 U.S.C. § 552(a)(2), must be indexed and made available to a member of the public on demand. H.R. Rep. No. 1497, 89th Cong., 2d Sess., 8 (1966) . . . . Finally, and more compre-

hensively, all “identifiable records” must be made available to a member of the public on demand. 5 U.S.C. § 552(a)(3). 421 U.S. 132, 136-137 (1975) (Footnotes omitted.)

The IRS did not argue in its petition for writ of certiorari or in the brief which it has submitted to the Court that private letter rulings and technical advice memoranda do not constitute final opinions as well as statements of policy and interpretations of law which have been adopted by the IRS and not published in the Federal Register. The IRS admits that private letter rulings and technical advice memoranda constitute its interpretations and legal conclusions of the tax law. (Pet. Br. 7, 12; Appendix, *infra*, 82-84). See *Statement of Procedural Rules*, Internal Revenue Service (26 C.F.R.), §§ 601.201(a)(2), 601.105(b)(5); I.R.M., pts. (11)613.1, (11)713. It must, therefore, be presumed that the IRS has conceded this point.

**C. Files Including Correspondence, Analysis and Submissions of Fact Applicable to the Issuance of Certain Published Excise Tax Revenue Rulings, Certain Communications with Respect to Excise Tax Private Letter Rulings as well as Certain Excise Tax Index-Digest Cards Constitute Reasonably Described Records Within the Meaning of 5 U.S.C. § 552(a)(3).**

Prior to the amendment of the FOIA in 1974, Section 522(a)(3) provided that agencies were to make available “identifiable records.” In 1974 this subsection was amended to provide that the agencies would make them available “. . . upon any request for records which reasonably describes such records. . . .” See Pub. L. 93-502, § 1(b)(1). The Senate Report on this amendment states:



This change again reflects the intent of the original drafters of the FOIA, for in explaining the term "identifiable," the 1965 Senate Report on the Act said:

The records must be identifiable by the person requesting them, i.e., a reasonable description enabling the Government employee to locate the requested records (*1966 Senate Rept.* at 8.)

... Agencies should continue to keep in mind, as specified in *A. G. Memorandum* (p. 24), that "their superior knowledge of the contents of their files should be used to further the philosophy of the act by facilitating, rather than hindering the handling of requests for records." S. Rep. No. 93-854, 93d Cong., 2d Sess. 9, 10 (1974)

The Report then states that the amendments to this subsection "make explicit the liberal standard for identification that Congress intended. ..." S. Rep. No. 93-854 at 10.

As in the case of private letter rulings and technical advice memoranda, the IRS has not argued that these requested records referred to in this subheading do not constitute reasonably described records within the meaning of 5 U.S.C. § 552(a)(3). It must, therefore, be presumed that the IRS has also conceded this point.

## I

**THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT EXCISE TAX PRIVATE LETTER RULINGS, TECHNICAL ADVICE MEMORANDA, INDEX-DIGEST CARDS AND CERTAIN FILES, CORRESPONDENCE AND COMMUNICATIONS DO NOT CONSTITUTE TAX "RETURNS MADE" UNDER SECTION 6103(a)(2) OF THE INTERNAL REVENUE CODE AND, THEREFORE, ARE NOT MATTERS SPECIFICALLY EXEMPT UNDER 5 U.S.C. § 552(b)(3).**

**A. Legislative History Requires FOIA Exemptions To Be Construed Narrowly**

The IRS claims that Exemption 3 prohibits disclosure of the requested records as "specifically exempted from disclosure by statute." This exemption, like all of the exemptions, is expressly limited by subsection (c), which provides:

This section does not authorize withholding of information or limit the availability of records to the public except as *specifically* stated in this section . . . . (Emphasis added.)

Senate Report No. 813 at page 10, states:

The purpose of this subsection (f) is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (e).<sup>3</sup> S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965) (Emphasis added.)

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), is almost identical. The courts considering FOIA cases

<sup>3</sup> Subsections (e) and (f) of S. 1160 (the FOIA) became §§ 552 (b) and (c) of the FOIA.



have generally followed the interpretation of the Act propounded by the Senate Report No. 813.

Justice Stewart, in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), invited Congress to clarify Section 552(b) of the FOIA, and such fact was noted by various Congressional committees in 1974. Congress did clarify its intentions by adding a new sentence at the end of subsection (b) providing that:

Any reasonably segregable portion of a record after deletion of the portions which are exempt under this subsection. Pub. L. 93-502, § 2(c) (November 21, 1974).

The legislative history of this new sentence is discussed in detail, commencing at page 59, *infra*. Thus, in 1974, Congress again reaffirmed its position that the exemptions were to be construed narrowly so as to limit the agencies' right to refuse disclosure of requested records.

#### B. Judicial Construction of Exemption 3

This Court stated in *Environmental Protection Agency v. Mink*:

"The policy of the Act requires that the . . . exemptions [be construed narrowly]." *Soucie v. David*, 145 U.S. App. D.C. 144, 157, 448 F.2d 1067, 1080 (1971). "A broad construction of the exemptions would be contrary to the express language of the Act." *Wellford v. Hardin*, 444 F.2d 21, 25 (C.A. 4, 1971). 410 U.S. at 96, n. 2.

See also H. R. Rep. No. 1419, 92d Cong., 2d Sess. 77 (1972).

The only opinion issued to date by this Court pertaining to the interpretation of Exemption 3 is *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975). In that case the FAA claimed that Exemption 3 applied to the requested information since Section 1104 of the Federal Aviation Act specifically permitted the Administrator to withhold information public disclosure of which, in his judgment, would adversely affect the interest of the objecting party and was not required to be disclosed in the interest of the public. In discussing the FOIA, this Court noted:

The Act has two aspects. In one, it seeks to open public records to greater public access; in the other, it seeks to preserve the confidentiality undeniably essential in certain areas of Government operations "if at all possible, are to be given effect." 422 U.S. 255, 261 (Citations omitted.)

The Court further said:

The language of Exemption 3 contains no "built-in" standard as in the case of some of the other exemptions. 422 U.S. at 262.

Respondents agree that the FOIA is not to be read "as repealing by implication all existing statutes 'which restrict public access to specific Government records.'" 422 U.S. 255, 265. It is the position of respondents that the records requested from the IRS are not specifically exempted from disclosure by statute.

This Court in *Robertson* held that the following language of the Federal Aviation Act gave the Administrator the power to withhold information from public view:

. . . the Board or Administrator shall order such information withheld from public disclosure when,

*in their judgment*, a disclosure of such information would adversely affect the interests of such persons and is not required in the interest of the public. 422 U.S. 255, 258, n. 4 (Emphasis added.)

Inasmuch as the Administrator was specifically given this broad power, such information was exempt by statute, and Exemption 3 was held to apply.

The case at bar differs from *Administrator, FAA v. Robertson*, in that no broad discretionary power to withhold records from public disclosure has been given to the IRS under Section 6103.

**C. Section 6103 of the Internal Revenue Code Does Not Bar Disclosure of Excise Tax Private Letter Rulings, Technical Advice Memoranda, Index-Digest Cards and Related Records.**

**1. Introduction**

Exemption 3 of the FOIA permits the nondisclosure of any matters which are specifically exempt by statute. The IRS argues that Section 6103 is such a statute and bars disclosure of the excise tax records requested by respondents. Throughout its brief, it asserts again and again that for purposes of Section 6103 any written or oral statement that is related to anything contained in a tax return or to the computation of tax liability is a "tax return." It is as though by repeatedly making the assertion it becomes a fact. It is not a fact, rather it is the issue in this case.

The requested records relate only to the manufacturers excise tax imposed by Chapter 32 of the I.R.C. Therefore, only Section 6103(a)(2) is involved, since it alone governs returns made with respect to taxes imposed by Chapter 32. Form 720 must be used for reporting the manufacturers excise tax, as well as cer-

tain other excise taxes, on a quarterly basis. Treas. Reg. § 48.6011(a)-1(a), T.D. 6915, 1967-1 Cum. Bull. 322, 330. As to this tax the only information reported is the dollar amount of the tax liability and the amount of credits to which the taxpayer is entitled for adjustments and previously paid deposits. These credits are subtracted from the stated excise tax liability on taxable articles to produce the tax due. Neither gross sales, taxable sales nor any other confidential information is required. An excise tax return is really nothing more than a form used to transmit the manufacturer's tax payment or notify the IRS that the total credits exceed his quarterly excise tax liability. The IRS has carefully avoided making reference to the fact that this case involves only a request for manufacturers excise tax records. Any definition of "tax return" under Section 6103 must be in relation to the reporting and computation of manufacturers excise tax liability.

The records requested by respondents (A. 9-14) are principally related to determinations of whether articles are taxable under Section 4061 of the I.R.C. and the methods, means and formulae for determining the applicable constructive sales price under Section 4216 (b) upon which the excise tax is computed.

The IRS states that Section 6103 imposes "confidentiality with respect to tax returns" (Pet. Br. 19). It also states that this nondisclosure rule is similar to that generally provided by 18 U.S.C. § 1905 forbidding government employees "to disclose financial or commercial information received in the course of employment." It further asserts that Section 7213 "makes it a misdemeanor for various specified persons to divulge data set forth in an income tax return." Respondents submit that the three laws cited by the



IR ' are narrow in scope. Section 6103 refers only to "returns." Section 1905 refers to "financial or commercial information." Section 7213 refers only to data "set forth or disclosed in any *income return*" and does not apply to excise tax returns (Emphasis added.); *United States v. Olster*, 15 F. Supp. 623 (D.C. Pa., 1936).

For three pages (Pet. Br. 18-20) the IRS glosses over the history of the confidentiality of "tax returns," then substitutes the broader term "tax information" (Pet. Br. 20) for "tax returns" and finally substitutes "information furnished by taxpayers to the Treasury" (Pet. Br. 21). Thus by such arbitrary progression the IRS seeks to equate "tax returns" with any "information furnished by taxpayers to the Treasury," whether or not it has anything to do with the computation or assessment of tax. The IRS then continually asserts throughout its brief that "information furnished by taxpayers to the Treasury" is exempt from disclosure.

Respondents do not contend nor did the court of appeals hold that privileged and confidential information is limited to that contained on printed tax forms (Pet. Br. 16). It is only data necessary for the computation of the tax which a taxpayer is required by law to submit to the IRS that is privileged or confidential. Section 6011 requires that "any person made liable for any tax . . . shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations." Nowhere in Section 6103(a) is the

term "information" used but only the phrase "returns made."

In *Florsheim Brothers Drygoods Co. v. United States*, this Court clearly set the standards of what constitutes a "tax return":

Statutes imposing direct taxes have always required taxpayers to file "lists" or "schedules" or "statements" or "returns" specifying in detail the information requisite for an assessment of the tax. The word "return" has not always been used. Sometimes it has been used as a synonym for "list," "schedule" or "statement." The specification in the statutes of the prescribed contents of such lists or returns has varied in its detail. But always definite statements of facts were required, from which the tax could be computed. (Emphasis added.) 280 U.S. 453, 457, n. 3 (1930)

The essence of a tax return is the financial data required by the IRS to be furnished for the computation and assessment of tax. This Court further stated in *Florsheim*:

The burden of supplying by the return the information on which assessments were to be based was thus imposed upon the taxpayer . . . Form 1120 provided for furnishing the data which would enable the Commissioner to make a determination, assessment and recomputation. 280 U.S. 453, 460.

The IRS continually reiterates in its brief that excise tax private letter rulings "set forth detailed statements of fact." It attempts to use the word "deailed" in the sense that a taxpayer's financial data is extensively set out. This is not the fact. A private excise tax letter ruling usually involves a



single legal issue based upon a very limited factual statement. In the Appendix, *infra*, 86-93, respondents have republished several excise tax private letter rulings which were furnished during the course of proceedings below (Transcript of Jan. 28, 1974, page 3) and most of which were in the Appendix to the respondents' brief in the court of appeals. Each ruling contains a concise statement of facts and then states the "position" or "opinion" of the IRS. The legal interpretations in these rulings are not contained in the IRS regulations. The only way other taxpayers could know of these interpretations of law would be by having access to these rulings, something the IRS has resisted to date.

The IRS further claims that "a letter ruling is essentially an advance audit procedure . . ." (Pet. Br. 12). This is also not a fact. Unlike an income tax return, an excise tax return does not require inclusion of facts upon which the tax is based or computed. Where favorable rulings have been issued holding that an article is not subject to the tax, the subject matter of the ruling would not even be reflected in the tax liability shown on the return if any excise tax return be required. An excise tax audit on the other hand constitutes a detailed check of underlying transactions not required to be reported on an excise tax return. It requires going beyond the return and examining the taxpayer's business, books and records in order to verify the base on which the tax is computed. Clearly an excise tax audit is not the same as a private letter ruling.

During the Senate hearings on the FOIA in 1963, Mr. Belin, then General Counsel of the Treasury Department, testified:

It should be remembered that although income tax returns may be specifically exempt from disclosure by statute, information about an individual's income derived from audits or other sources is not similarly specifically protected. *Hearings on S. 1666 and S. 1663 (in part) before the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 174 (1963).*

It should be noted that the three affidavits submitted at trial by the IRS and quoted at pages 7 and 8 of its brief do not discuss the interpretation of "return" with which we are here concerned, but rather relate only to the question of whether the requested records are final opinions or interpretations of the agency under Section 552(a)(2)(A) and (B) of the FOIA, which has been conceded by the IRS.

In the present case there is no statute which specifically states that excise tax private letter rulings, technical advice memoranda, index-digest cards or certain underlying files and correspondence cannot be disclosed under the FOIA. In order to justify non-disclosure, the IRS argues that Section 6103 of the I.R.C., which declares certain tax returns to be public records subject to inspection pursuant to regulations promulgated by the President, bars disclosure of the requested records. Obviously, the only way Section 6103 could apply to the requested records is if they are included within the definition of "returns." Therefore, an examination of legislative history and judicial construction of applicable law is required to determine the scope of the definition of "return."

**2. The History of Section 6103, When Read in Conjunction With Section 7213, Establishes That "Returns" Only Include Such Data as Is Necessary to Compute the Tax Shown on the Return.**

**a. History of Section 6103.**

The IRS rulings program as presently constituted is approximately 38 years old. Caplin,<sup>4</sup> *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, 20 N.Y.U. Inst. on Fed. Tax. 1, 2 (1962). Congress did not see fit to amend either Sections 6103 or 7213 when this rulings program came into being nor did the IRS request any change. In the past, the IRS has made public use of and relied on private letter rulings by introducing them into evidence in *Allstate Insurance Co. v. United States*, 329 F.2d 346 (C.A. 7th, 1964). This further indicates that the IRS itself did not consider them to be "returns," "financial or commercial information," or data "set forth or disclosed in an income return."

The IRS (Pet. Br. 18) refers to the legislative history of Section 6103. Other than merely stating that the early law dealt with "confidentiality requirements with respect to tax returns" the IRS makes no detailed analysis of the early laws. Respondents have searched, as apparently did the IRS, and can find no legislative history which sheds light on the meaning of "returns" other than the language contained in the various Revenue Acts themselves. All such Acts use only the terms "return" or "returns made". It is obvious that if the rulings program, as presently constituted, has been in existence for only thirty-eight years, Congress could not, between 1870

<sup>4</sup> At the time of the publication of this article, Mortimer M. Caplin was Commissioner of Internal Revenue.

and 1938, have passed upon whether a private letter ruling constitutes a "return." It has been the courts which have defined the meaning of "returns" as used in the I.R.C.

**b. History of Section 7213.**

It must be pointed out that Section 6103 is not the only section of the I.R.C. dealing with non-disclosure. Section 7213 provides that an officer or employee of the United States may not disclose "... the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return" and certain trade secrets. (Appendix, *infra*, 76-77)

In this Section Congress has set forth categories of financial data which cannot be disclosed. When Section 6103 is read in conjunction with Section 7213, the purpose of these non-disclosure provisions is clearly to protect the interests of persons compelled under the revenue laws to file tax returns. *Boske v. Comingore*, 177 U.S. 459, 470 (1900). Respondents have not requested financial data which taxpayers are required to report on their excise tax returns but merely seek interpretations of law contained in records generated, maintained and relied on by the IRS.

A review of the history of Section 7213 reinforces the conclusion that the only types of records which Congress intended to protect from disclosure by this Section were income returns under Section 6103, trade secrets and financial data necessary to compute the tax due.

The Act of June 30, 1864, ch. 173, § 38, 13 Stat. 223, 225, 258 (the forerunner to Section 7213), pertaining to disclosure of information, provided that



no internal revenue employees shall make known "... in any other manner than may be provided by law, the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties. . . ." It is apparent that this statute contained no definition of "return," but only the admonition not to disclose "the operations, style of work, or apparatus of any manufacturer . . . ." Such information could constitute trade secrets of the taxpayer and could be exempt from disclosure under Exemption 4 of the FOIA.

In 1894, the Fifty-third Congress included in the then newly enacted Income Tax Act (subsequently declared unconstitutional) additional provisions relating solely to income returns. It provided in part that no employee of the United States shall

make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amounts or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return by any person or corporation . . . Act of August 27, 1894, ch. 349, § 34, 28 Stat. 509, 557.

### c. Conclusion.

The legislative history discussed in the foregoing pages makes it clear that Congress did not intend the word "returns" as used in Section 6103 to include every piece of paper in the files of the IRS but rather intended to restrict nondisclosure only to that report containing "the information requisite for an assessment of the tax." *Florsheim Brothers Drygoods Co. v. United States*, 280 U.S. 453, 457, n. 3. Excise tax private

letter rulings, technical advice memoranda and other requested records do not contain information necessary for the assessment of tax and, therefore, do not constitute "returns made" as stated in Section 6103. This being the case, there is no statute specifically exempting the requested records from disclosure.

### 3. Judicial Construction of the Term "Returns" as Used in Other Sections of the Internal Revenue Code Establishes THAT Private Letter Rulings, Technical Advice Memoranda and Related Documents Are Not "Returns" Within the Meaning of the Code.

#### a. Introduction.

The term "returns" is used extensively throughout the I.R.C. While neither Section 6103 nor any other part of the Code contains a definition of the term, many courts have been called upon to construe the term in connection with such other Code sections. In other cases the IRS has argued in favor of a narrow interpretation of "return", and uniformly the Court definitions have been restrictive.

#### b. Statute of Limitations, Section 6501.

The statute of limitations barring the assessment or collection of taxes begins to run with the filing of a "return." I.R.C., § 6501. For purposes of the statute of limitations, an income tax return is a statement under oath (if required) of the specific items of a taxpayer's income, deductions and credits which is necessary to enable the Commissioner to compute and assess the tax. *Florsheim Brothers Drygoods Co. v. United States*, 280 U.S. 453, 460 (1930); *John H. Houston*, 38 T.C. 486, 491 (1962); *Stevens Brothers Foundation, Inc.*, 39 T.C. 93, 105 (1962), *aff'd* in part and *rev'd* in part, 324 F.2d 633 (C.A. 8th, 1963).



This Court has recognized that a "return" must disclose income and deductions "with such uniformity, completeness and arrangement that the physical task of handling and verifying returns may be readily accomplished." *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944).

It has been held that a "return" filed by a successor corporation which grouped the income and losses of the old and new corporation without segregation was not sufficient. *Cem Securities Corp. v. Commissioner*, 72 F.2d 295, 298 (C.A. 4th), *cert. denied*, 293 U.S. 613 (1934).

The IRS argues at page 37, n. 19 of its brief that a W-2 form is "deemed a return." The IRS has taken both sides of the question of whether even a W-2 form is part of a return. In *United States v. Accardo*, 298 F.2d 133 (C.A. 7th, 1962), the government introduced Forms 1040 as income tax returns, after detaching the W-2 forms therefrom.

A tentative excess profits tax return showing the taxpayer's name, address and amount of estimated tax due was held not to be a return because the items of income, deductions and credits were not stated. *Southern Sportswear Co. v. Commissioner*, 10 T.C. 402, 404, 405 (1948), *vacated on other grounds*, 175 F.2d 779 (C.A. 6th, 1949).

**c. Penalty, Section 6651.**

The I.R.C. also provides for a penalty not exceeding 25% of the aggregate of the tax due for failure to file an income tax "return" on the date prescribed. I.R.C. § 6651(a). A return sufficient to preclude the imposition of the 25% penalty is a report giving substantial in-

formation as to the specific items of the taxpayer's gross income and the deductions and credits to which he is entitled. *Commissioner v. Lane-Wells Co.*, 321 U.S. 219 (1944).

Similarly, in *National Contracting Co.*, 37 B.T.A. 689, *aff'd*, 105 F.2d 488 (C.A. 8th, 1939) a blank return containing a rider stating the return was submitted pending the outcome of tax questions for other years was not an income tax return. See also *Harrington Co.*, 6 T.C. 720 (1946).

It has been held that Form 1040 filed within the allotted time does not qualify as an income tax "return" where it does not state specifically the items of gross income and the deductions and credits allowed. *Leo Sanders*, 21 T.C. 1012 (1954), *aff'd*, 225 F.2d 629 (C.A. 10th, 1957).

**d. Failure to File a Return, Section 7203.**

The wilful failure to file a "return" constitutes a misdemeanor under the I.R.C. Here, as with the other Code provisions, the essence of the term "return" is a report to the IRS which contains information required to be included on the form used for the determination of tax liability, such as the taxpayer's income, credits and deductions. *United States v. Porth*, 426 F.2d 519, (C.A. 10th) *cert. denied*, 400 U.S. 824 (1970). In *Porth*, it was held the filing of a form with only the taxpayer's name and reference to various constitutional provisions which he asserted excused him from filing was not a return within the meaning of Section 7203. 426 F.2d at 523.

Similarly, a blank Form 1040 has been held not to constitute an income tax "return" within the meaning

of Section 7213. *United States v. Radue*, 486 F.2d 220 (C.A. 5th), *cert. denied*, 416 U.S. 908 (1973).

As can be seen from the above discussion, the term "return" has consistently been held to be a report by a taxpayer to the IRS containing required financial data from which a tax can be computed. Excise tax returns need only include the tax liability and credits with no such financial data being required.

#### D. Analysis of IRS Regulations Under Section 6103.

None of the prior regulations of the IRS included a definition of the term "return" which was as broad and sweeping as its definition included in the present regulations. Treas. Reg. § 301.6103(a)-1(a)(3)(i), T.D. 7162, 1972-1 Cum. Bull. 382.

The following definition of "returns" appeared in the 1938, 1941 and 1953 regulations:

For the purposes of this article the word "returns" shall include information returns, schedules, lists, and other written statements filed with the Commissioner designed to be supplemental to or to become a part of *income* returns. Treas. Reg. Art. 55(b)-5 (1938); Treas. Reg. § 29.55(b)(1) (1941); Treas. Reg. § 39.55-1 (1953); (Emphasis added; Appendix, *infra*, 77-78).

In 1961, the IRS issued a Treasury Regulation which deleted reference to "income" returns. Treas. Reg. § 301.6103(a)-1, T.D. 6543, 1961-1 Cum. Bull. 671, 673.

A comparison of the 1961 and 1972 definitions promulgated by the IRS shows the expansive language of the 1972 regulation:

#### 1961

(3) *Terms used*—(i) *Return*. For purposes of Section 6103(a), the term "return" includes—

Information returns, schedules, lists, and other written statements filed with the Internal Revenue Service which are designed to be supplemental to or to become a part of the return, and, in the discretion of the Secretary or the Commissioner or the delegate of either, other records or reports containing information included or required by statute to be included in the return....

#### 1972

(3) *Terms used*—(i) *Return*. For purposes of Section 6103(a), the term "return" includes—

(a) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and

(b) Other records, reports information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken or any portion thereof, relating to the items included under (a) of this subdivision.

As can be seen, the IRS has not considered the term "return" to include all "information furnished by taxpayers to the Treasury" as now contended by the IRS. Only those lists, schedules and written statements which were "designed to be supplemental to or to become part of a return" were previously included. It should be pointed out that on February 7, 1972, the plaintiffs in *Tax Analysts & Advocates v. Internal Revenue Service*, 362 F. Supp. 1298 (D.D.C., 1973), filed their formal request for private revenue rulings and technical advice memoranda (involving *income* tax matters) with the IRS. Nine days later, February 16, 1972, by Treasury Decision 7162, the new definition of "return" was issued. The regulation, in which the new definition of "return" was included, was issued *with-*



out prior notice or hearing. Treas. Reg. § 301.6103(a)-1, T.D. 7162, 1972-1 Cum. Bull. 382.

The IRS contends that Congress' several reenactments of Section 6103 while the earlier, and much less sweeping, regulations were in force shows that Congress understood and approved its present broad definition; and that likewise, the FOIA must be construed to comprehend the same broad definition. *The simple answer is that the broad language dates only from February 6, 1972, and Congress has not reenacted Section 6103 since that date.* The regulation in effect before that date provided that "return" included only such "records or reports containing information included or required by statute to be included in the return." The date of the regulation not only deprives it of the benefit of "reenactment"—it makes it suspect as possibly written with FOIA litigation in mind, since the enactment by Congress of the FOIA clearly undercuts any antiquated agency decisions tending to support nondisclosure.

Treasury Decision 7162, which announced the amendment of Regulation § 301.6103, declared that it was designed "to clarify the definition of the term 'return' under Section 6103 of the Internal Revenue Code of 1954. . . ." If it was unclear, it can hardly be deemed approved by enactment of the FOIA in 1966.<sup>5</sup>

**E. The New Regulations of the IRS Are Inapplicable  
Since They Exceed Statutory Bounds.**

The IRS has attempted by regulation to establish a definition of "return" broad enough to include all of the requested excise tax records.

<sup>5</sup> Moreover, the regulation is invalid because it was issued without proper notice as required by 5 U.S.C. § 553(b).

It includes any oral or written information, in whatever form, "relating to" anything which, in turn, is "designed to be supplemental to or become part of a return." Treas. Reg. § 301.6103(a)-1(a)(3), T.D. 7162, 1972-1 Cum. Bull. 382. It far exceeds the intent of Section 6103 and is an attempt by the IRS to amend the statute administratively to suit its own purposes and to come within the ambit of Exemption 3. The regulation as so construed is unlawful and clearly violates the intent of the FOIA.

The general rule that the scope of a regulation, including a Treasury regulation, cannot exceed the bounds of the statute has been recognized by this Court from an early date. *United States v. Two Hundred Barrels of Whiskey*, 95 U.S. 571 (1877); *Campbell v. Galeno Chemical Co.*, 281 U.S. 599, 610 (1930); *International Railway v. Davidson*, 257 U.S. 506, 514 (1922); *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129 (1936). See *Helvering v. Sabine Transportation Co.*, wherein, when holding a Treasury regulation invalid, the Court stated:

We think the regulations are in the teeth of the unambiguous mandate of the statute, are contradictory of its plain terms, and amount to an attempt to legislate. They cannot prevail to preclude the credit claimed. 318 U.S. 306, 311-12 (1943) (Footnote omitted).

In summary, "where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation." *Koshland v. Helvering*, 298 U.S. 441, 447 (1936), (Footnote omitted.)



**F. Petitioner Has Voluntarily Made Public Records Similar  
To Those Requested in This Case.**

In *Allstate Insurance Co. v. United States*, 329 F.2d 346 (C.A. 7th, 1964), Allstate brought a refund suit to recover over \$3,400,000 in Korean War excess profits taxes paid for the years 1950, 1952 and 1953. The formula under which Allstate had computed its taxes was conditioned upon it not having a privilege of filing a consolidated tax return with its parent corporation, Sears, Roebuck & Co. A literal reading of applicable Treasury regulations prohibited such consolidated filing due to their different accounting periods and the requirement that Allstate, as an insurance company, use a calendar year for income reporting purposes. The IRS contended that there was an unpublished administrative practice existing within the IRS by which Sears and Allstate would have secured a private ruling allowing them to file consolidated returns had they requested it.

To prove the existence of this unpublished administrative practice, the IRS offered at trial the deposition of its Assistant Commissioner (Technical) Harold T. Swartz (Supp. App. 53-181). He was represented by the IRS as

... an individual who is probably more fully acquainted than is any other person in the nation with the facts concerning the administrative practices of the Revenue Service in issuing rulings. (Supp. App. 252.)

Swartz was in charge of all rulings issued to taxpayers as well as answering all requests for technical advice received from field offices (Supp. App. 61). All of the private letter rulings that had been issued in the area of consolidated returns where one of the affiliates was

an insurance company were voluntarily introduced into evidence by the IRS as constituting its administrative practice. (Supp. App. 76-79, 90, 192-234). In its memorandum opinion and order, in *Allstate*, July 31, 1962 (Supp. App. 15), the district court held:

[I]t is determined that the Swartz deposition and the letter rulings do tend to establish the proposition which they are offered to prove, namely the existence of an unpublished administrative practice. . . . The court thus concludes that the Swartz deposition and the letter rulings are both relevant and competent. Accordingly, Allstate's objections to the admission of the Swartz deposition and the letter rulings into evidence are overruled.

In order to establish this administrative practice, Swartz testified at length as to the actual practice followed by the IRS in issuing and using private letter rulings, technical advice memoranda and index-digest cards. To enable field offices of the IRS to obtain the reasoning behind private letter rulings issued by the National Office, they are distributed to them with a copy of the index-digest card attached. The rulings sent to the field are used for the same purpose as those in the National Office, as setting forth the precedents and positions of the IRS (Supp. App. 92-94, 122-123, 186-187). Private letter rulings circulated to the field contain the names of the taxpayers and are called "confidential unpublished rulings" or CUR's (Supp. App. 123). These are confidential to the extent that the name of the taxpayer is not to be cited when relying on the ruling (Supp. App. 124). The provision in the Internal Revenue Bulletin that unpublished rulings are not to be cited or relied upon by employees of the IRS as precedent in the disposition of other cases is limited to preservation of the identity of the taxpayer. They

are used in disposing of issues coming before agents in the field but are not cited or quoted (Supp. App. 124-125). The fact that one taxpayer cannot rely upon a private letter ruling issued to another does not mean that such ruling has not become a procedure, practice or position of the National Office with respect to similar issues. In fact, it indicates that the same answer would be given to other taxpayers except where the position has been changed (Supp. App. 175). Once a ruling has been placed in the precedent file it is always the administrative practice to follow it unless some consideration causes a change in position (Supp. App. 181).

The IRS, through Swartz, offered seven private letter rulings into evidence as well as requests for rulings, a request for reconsideration of a ruling and a resulting supplemental ruling. These were from both precedent and general files (Supp. App. 66-75). During the course of his deposition, Swartz identified each of the documents contained in these files (Supp. App. 115-165). This led to Allstate filing a motion for inspection and copying of documents described by Swartz in his deposition, including a technical advice memorandum and any files located in the office of the Chief Counsel pertaining to any of the private letter rulings (Supp. App. 12-17). The IRS opposed the motion on grounds of relevance, attorney-client privilege, attorney-work-product and executive privilege but did not raise any privilege based on Sections 6103 or 7213 (Supp. App. 240-244). At a hearing on January 11, 1962, the IRS waived all objections except relevance and read into the record a portion of a technical advice memorandum issued to the District Director in Chicago relating to the Allstate case itself. The court ruled

against the IRS as to relevance, and all requested documents were turned over to Allstate and offered into evidence (Supp. App. 234-239). All of the rulings, requests, General Counsel Memoranda and other documents were turned over by the IRS complete and intact except for partial deletion of names of the taxpayers and their representatives (Supp. App. 192-238).

**G. At Congressional Hearings on the FOIA the IRS Admitted That the Requested Records Do Not Constitute "Returns" Under Section 6103.**

Prior to the enactment of the FOIA representatives of the IRS testified before the Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary<sup>a</sup> concerning both the scope of Section 6103 and the disclosure of private letter rulings and other records. The then General Counsel of the Treasury Department, Mr. Belin, accompanied by the Commissioner of the IRS, stated that while income tax returns were specifically exempt from disclosure by statute, information about an individual's income derived from audit or other sources is not exempt. He also testified that the Treasury Department was not opposed to making its rulings and decisions public. He said that every citizen should readily be able to secure precedential rulings, orders, interpretations, rulings and adjudications of the IRS. Mr. Belin did not consider that private letter rulings or technical advice memoranda would be exempt from the disclosure pro-

<sup>a</sup> *Hearings on S. 1666 and S. 1663 (in part) before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. (1963).*



visions under Section 6103 or any other statute.<sup>7</sup> He specifically informed the subcommittee of the burden that would be involved in deleting identifying details

<sup>7</sup> "Many records of the Internal Revenue Service in addition to those which are presently specifically exempt from disclosure by statute, disclose information about our incomes, our business activities, and our transactions with others. It should be remembered that although income tax returns may be specifically exempt from disclosure by statute, information about an individual's income derived from audit or other sources is not similarly specifically protected. Furthermore, existing statutes do not protect information derived from the administration of various other taxes including retailers' excise taxes, taxes on admissions and dues and regulatory taxes such as those on narcotics."

\* \* \* \* \*

"The provisions of the bill with respect to the publication and indexing of material are at least as objectionable as those relating to disclosure of official records. One effect of the bill would be to require the publication and indexing of many millions of decisions, rulings and interpretations which are neither needed nor wanted by the public. We have been unable to calculate the cost of such indexing and publication to the Treasury Department, but it clearly would be very great. *In this connection, we wish to repeat that the Treasury Department is not opposed to publicity for its rulings and decisions. . . .*"

"We have every reason to believe that every citizen having any concern with these matters can readily secure all needed information as to precedential rulings, orders, and interpretations either through the voluminous printed material now available or by direct correspondence with the appropriate bureau or office."

"We reiterate therefore that our concern with the indexing and publication features of the present bill does not stem from any objection to keeping the public properly informed as to the rulings and adjudications of the Department, but we are deeply concerned by the provisions of the bill which would require the publication or indexing or both, of all opinions, orders, rules, statements, and interpretations regardless of their importance to the public. As we have pointed out in our detailed statement, provisions such as those contained in the present bill would require the publication or indexing of literally millions of items every year for no useful purpose." (Emphasis added.) *Id.* at 173, 176

from private letter rulings and technical advice memoranda before making them public.<sup>8</sup>

Mr. Belin specifically referred to the coverage of Sections 6103 and 7213 as they relate to the disclosure of tax information. He testified that Section 6103 did not afford confidentiality to all information that taxpayers are required to submit to the IRS. He stated that Sections 6103 and 7213 "are chiefly limited to tax returns" and provide little protection to tax information derived from audits and inspections conducted by IRS employees.<sup>9</sup>

<sup>8</sup> "There would also be a very heavy burden requiring substantial additional personnel in certain bureaus in the deletion of identifying details found, for example, in taxpayer rulings, of which over 30,000 are issued each year. Not only names but other identifying circumstances would have to be edited, with the incidental result in many cases that the published ruling would be virtually meaningless. The Treasury has tried to make some estimate of the additional requirements of funds for personnel, space, and equipment which this feature of section 3(b) would impose on its many affected bureaus, but can only state at this time that the added cost would be very large indeed."

\* \* \* \* \*

"... A myriad of other rulings or interpretations on similarly clear points would also have to be indexed at considerable expense and for no benefit that this Department can perceive. Informal rulings such as the above illustration are not combined centrally or counted. However, formal taxpayer rulings and requests from field offices for technical advice amount to 35,000 to 37,000 a year." *Id.* at 278-79, 281.

<sup>9</sup> "... Section 6103, for example by no means affords confidentiality to all of the information which is required to be submitted by taxpayers. For example, this section does not apply to information in the files of the Internal Revenue Service as a result of the administration of retailers' excise taxes, taxes on admissions and dues, documentary stamp taxes, taxes on wagering or regulatory taxes. Moreover, neither section 6103 nor section 7213 affords full protection to the taxpayer even with regard to income tax information. Both sections are chiefly limited to tax returns. To the extent



The testimony by Mr. Belin, on behalf of the IRS, made Congress fully aware that passage of the FOIA would require the public disclosure of private letter rulings and technical advice memoranda. Despite this fact, the FOIA was enacted without any changes relevant to the disclosure of these records. This precisely reflects Congressional intent as to the scope of Section 6103 that was being incorporated in Exemption 3. On page 14 of its brief, the IRS states:

Thus, when Congress in Exemption 3 continued the effectiveness of Section 6103, it necessarily intended to include the administrative interpretation of the reach of that section which is reflected by the policy of the Internal Revenue Service.

As has been shown above, "the reach of that section" has never gone beyond tax returns to the records requested in the case at bar. The practice of the IRS is shown by the *Allstate* case, and its policy was set forth by its general counsel, Mr. Belin.<sup>10</sup>

When Congress enacted the FOIA it certainly never intended to sanction what the IRS now calls its long standing administrative interpretation of Section 6103 (Pet. Br. 14). In reviewing the effectiveness of the FOIA and agency compliance in 1972, Congress recognized the flagrant abuses by the IRS and its refusal

this information is derived, as much information is derived, from audits and inspections by Internal Revenue employees, little protection is afforded to the taxpayer by either of these statutes." *Id.* at 274-75.

<sup>10</sup> For an affirmation of this position see the testimony of Edwin F. Rains, then Asst. General Counsel, U.S. Treasury Department, *Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965).

to comply with the Act. Following are two excerpts of statements concerning IRS abuses of the FOIA:

1. Mr. Phillips (Staff director of the Sub-Committee): . . . I can honestly say, Mr. Chairman, of all of the agencies of Government the IRS has been the most flagrant in violating not only the spirit, but the letter of the Freedom of Information Act. We have many complaints in our files from citizens. In my opinion, the policies of the Internal Revenue Service in Freedom of Information matters has almost become a national scandal.<sup>11</sup>
2. Senator Kennedy: In the course of your hearings which agencies had the best record of making the information available to Congress and the public and which had the poorest?

Congressman Moorhead:<sup>12</sup> I would start maybe with the poorest. The Department of Agriculture, the Food and Drug Administration, and the Internal Revenue Service were among the worst.

Senator Kennedy: Are they sort of constant repeaters?

Congressman Moorhead: Yes, constant repeaters.

Senator Kennedy: From the trend that you saw of these particular agencies over any given period of time, they were the most reluctant or recalcitrant?

<sup>11</sup> *Hearings on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pt. 6, 2021 (1972).

<sup>12</sup> Honorable William S. Moorhead, Chairman, Foreign Operations and Government Information Subcomm., House Comm. on Government Operations.

Congressman Moorhead: I think those were the most reluctant and recalcitrant; there were others, too.<sup>13</sup>

On page 38 of its brief, the IRS quoted one sentence from a House Subcommittee report of findings:

It should be noted that much tax data is exempt from disclosure by law.

The unquoted portion of the same paragraph is far more revealing as to the Subcommittee's findings. The complete paragraph, including the above quoted portion, reads:

Testimony by Mr. Donald O. Virdin, Chief, Disclosure Staff, Office of the Assistant Commissioner (Compliance), Internal Revenue Service (IRS) and that of Mrs. Charlotte T. Lloyd, Assistant General Counsel, Treasury Department covered some of the most serious cases of bureaucratic abuses uncovered during the subcommittee's investigation of the administration of the Freedom of Information Act. This subject is also dealt with earlier in this report. It should be noted that much tax data is exempt from disclosure by law. H. R. Rep. No. 93-1419, 92d Cong., 2d Sess. 34 (1974) (Footnote omitted.)

The subject "dealt with earlier in this report" concerns the trials and tribulations of Mr. and Mrs. Long with the IRS, including, among other things, the refusal to furnish them some blank IRS forms.

<sup>13</sup> *Hearings on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923 and S. 2073 Before the Subcomm. on Intergovernmental Regulations of the Comm. on Government Operations of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., v.1. 188 (1973).*

#### H. Disclosure of the Records Requested Is Necessary To Avoid Disparity in the Treatment of Taxpayers.

In spite of the announced purpose of the IRS to achieve uniform application of the tax law by the use of revenue rulings (Pet. Br. 26), in many cases those who receive a favorable private letter ruling or technical advice memorandum are receiving favored tax treatment from the IRS, resulting in disparity in the application of the tax law. *International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl., 1965), *cert. denied*, 382 U.S. 1028 (1966). In that case, the IRS issued a favorable private letter ruling to a competitor of I.B.M., exempting it from the manufacturers excise tax on computers manufactured by it. When I.B.M. learned of this, it also sought an exemption for similar computers manufactured by it. The IRS issued an unfavorable ruling to I.B.M. and revoked the prior favorable ruling issued to its competitor. As to the competitor, however, revocation of the ruling was made prospective only. The Court of Claims held that I.B.M.'s competitor had been unduly favored in the promulgation of this ruling, and that I.B.M. could recover approximately \$11,000,000 of manufacturers excise taxes paid by it. The Court therein stated:

For all tax rulings, it is important that there be like treatment to those who should be dealt with on the same basis. *Automobile Club of Michigan v. Commissioner*, supra 353 U.S. at 180, and other cases cited supra at page 9. Parity in the levying of manufacturer's tax is peculiarly essential to free and fair competition. See *Exchange Parts Co. v. U.S.* supra, 150 Ct. Cl. at 541, 279 F.2d at 253; H. Rept. No. 708, 72d Cong., 1st Session, pp. 31, 32 (1932). 343 F.2d at 923.



Since the rulings process is not an adversary proceeding, there is at present no way of insuring that both the public and private interests will be fully protected against disparity in the application of the revenue laws. In fact, in some cases actual harm to the public interest can result. For example, this issue of harm to the public interest is clearly illustrated in the case of the so-called "production payment carve-out."<sup>14</sup> In the mid-1960's, hard minerals producers began to use this device and related tax avoidance devices. One such related tax avoidance device was the "A-B-C" transaction popular in the rush to build conglomerates.

In the late 1960's, the IRS developed an unpublished but favorable "position" for taxpayers and issued more than 20 private letter rulings approving such "A-B-C" transactions. Senator Albert Gore exposed and criticized the IRS position in four speeches on the floor of the Senate.<sup>15</sup>

In the Tax Reform Act of 1969, Congress abolished the practice and required the transactions to be treated as loans, which, in substance, they were. I.R.C. § 636.

The requirement that private letter rulings be made public is a *sine qua non* to prevent, or at least expose, similar abuses in the future.

Respondents are not requesting information relating to the excise tax liability of a particular taxpayer, but only those records in the files of the I.R.S. concerning the interpretation of the excise tax law. These in-

<sup>14</sup> Joint Comm. on Internal Revenue Taxation, *General Explanation of the Tax Reform Act of 1969*, 92d Cong., 1st Sess. 158-61 (1970).

<sup>15</sup> These speeches were made on June 8 and August 11, 16 and 19, 1966. See 112 Cong. Rec. 12,080-84; 18,146-47; 18,685; 19,166-67 (1966).

terpretations have heretofore been kept secret and are not available to the general public from any other source. There is an infinite difference between disclosing "the law" and disclosing privileged and confidential commercial and financial data contained in a tax return.

Respondents submit that excise tax private letter rulings and technical advice memoranda have long constituted a body of secret law which favor those few taxpayers able to afford the cost of obtaining them. Most of the interpretations are not restated in the regulations or published revenue rulings of the IRS. All taxpayers have a right to the same governmental interpretations of law. As was stated in Senate Report No. 813 at 10, pertaining to the FOIA:

A government by secrecy benefits no one. It injures the people it seeks to serve, it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty. S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965)

The records requested do not constitute "returns made" within the meaning of Section 6103 and should be disclosed.

## II

### THE 1974 AMENDMENTS TO SECTIONS 552(b) and 552(a)(4)(B) OF THE FOIA REQUIRE REASONABLY SEGREGABLE PORTIONS OF THE RECORDS REQUESTED TO BE SUBMITTED FOR IN CAMERA REVIEW.

#### A. Introduction.

The IRS has failed to discuss in its brief two of the 1974 amendments to the FOIA which have a direct



bearing upon the disposition of this case in favor of the respondents, despite the assertion of Exemption 3 by the IRS.

The first of such amendments added the following sentence at the former end of Section 552(b):

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

The provisions of such new sentence must be read in connection with the new in camera review provision of Section 552(a)(4)(B), which provides:

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

As well stated in Part I-C of the Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, 14 (February, 1975):

The legislative history of these two related provisions indicates that Congress intended to codify a deletion principle, already applied in numerous instances by courts and agencies, so as to prevent

the withholding of entire records or files merely because a portion of them are exempt, and to require release of non-exempt portions.

In providing that the additional language of subsection (b) was to apply not only to the original House proposal but to *all* exemptions, Senate Report No. 93-854, contains language which leaves no room for question.<sup>16</sup>

On the Senate floor, May 30, 1974, an outline was given as to the changes made by S. 2543. Insofar as

<sup>16</sup> "The FOIA itself directs that 'To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details' when it makes information public. (§ 552(a)(2); see *Roses v. Department of the Air Force*, — F.2d — (2d Cir., March 29, 1974, No. 73-1264).) (sic) So also where files are involved will courts have to examine the records themselves and require disclosure of portions to which the purposes of the exemption under which they are withheld does not apply."

"This provision would apply if, for example, there were a request for a record in a file that had been opened in the course of an investigation that had long since been closed, but which file contained the name of an informer or raw data on innocent persons or confidential investigative techniques. Section 2(b) emphasizes what is presently understood by most courts but has gone unheeded by agencies; it would not be enough for the government to refuse disclosure of the record merely because it or the file it was in contained such exempt information, since deletion of that information would provide full protection for the purposes to be served by the exemption. Thus, the government could not refuse to disclose the requested records merely because it finds in those records some portions which may be exempt."

"The language originally proposed in S. 2543 as introduced provided that 'if the deletion of names or other identifying characteristics of individuals would prevent an inhibition of informers, agents, or other sources of investigatory or intelligence information, then records otherwise exempt under clauses (1) and (7) of this subsection, unless exempt for some other reason under this subsection, shall be made available with such deletions'. *The amended language is intended to encompass the scope of this original proposal but apply the deletion principle to all exemp-*

pertinent it states (120 Cong. Rec. S9313 (daily ed. May 30, 1974)) (remarks of Senator Kennedy):

Thirteenth. Segregable records. S. 2543 adds a new provision to the act stating that if exempt *portions* of requested records or files are severable, they should be severed—or deleted, as the case may be—and the nonexempt portions disclosed. Many courts are requiring this now, and the bill emphasizes the desirability of this approach in providing specifically that courts may order disclosure of “*portions*” of files or records as well as entire files or records. (Emphasis added.)

Continuing at S9315:

With the new provisions it should be clear that there can be no blanket claim of confidentiality under *any* of the exemptions. (Emphasis added.)<sup>17</sup>

#### B. Segregable Records.

Why were the new provisions added to the FOIA? In the amendments first proposed, the House of Repre-

*tions.*” (Emphasis added.) S. Rep. No. 93-854, 93d Cong., 2d Sess. 33 (1974)

<sup>17</sup> Senator Kennedy further stated:

This new requirement is also consistent with the most judicial pronouncements in Freedom of Information Act cases, although unfortunately some courts are not adhering to the principle under some exemptions. The new language in S. 2543 should extend this deletion principle to *all* cases, involving *all* exemptions. As one court observed, “it is a violation of the act to withhold documents on the ground that parts are exempt and parts nonexempt.” “Suitable deletion may be made,” said the court. In another case the court found that the legislative history of the Freedom of Information Act “does not indicate . . . that Congress intended to exempt an entire document merely because it contained some confidential information.” And another court said that “identifying details or secret matters can be deleted from a document to render it subject to disclosure.” (Emphasis added.) 120 Cong. Rec. S9315.

sentatives only considered amending Exemptions 1 and 7.

The sentence added to the end of Section 552(b) had its origin in the recommendations of the Administrative Conference of the United States at the 1972 Hearings.<sup>18</sup> The Senate added this sentence as an amendment and, in Senate Report No. 93-854, reported:

. . . The spokesman for the American Bar Association suggested in the hearings that ‘it would also be useful to amend the statute so as to make it clear that agencies are required to separate exempt from non-exempt information in a particular record, and make available the non-exempt information. The committee believes that this requirement is understood in the basic FOIA, and the inclusion of this amendment provides authority for the court during judicial review to undertake such separation if the agency has not. S. Rep. No. 854, 93d Cong., 2d Sess. 17 (1974)

The same Report, at pages 32-33, then states:

A new paragraph is proposed to be added to section 552(b) requiring that where only a portion of a record is determined to be exempt from disclosure, the record must be disclosed with the exempt portion deleted. The direction expressed by the paragraph is consistent with one of the recommendations of the Administration Conference and with court interpretations of the FOIA.

\* \* \*

In light of this new provision courts will have to look beneath the label on a file or record when the withholding of information is challenged. Courts have already held that where intra-agency memo-

<sup>18</sup> *Hearings on U.S. Government Information Policies and Practices*, *supra* n. 11, at 1219.



randa are requested, opinion must be severed from purely factual material, with the latter being disclosable. *Environmental Protection Agency v. Mink*, 410 U.S. 73, 89, 91 (1973).

In *Mink* the respondents were attempting to obtain factual data concerning nuclear testing. When discussing whether such data would be exempt under Exemption 5, as well as Exemption 1, the Court stated:

Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data. That decision should not be taken, however, to embrace an equally wooden exemption permitting the withholding of factual material otherwise available on a discovery merely because it was placed in a memorandum with matters of law, policy or opinion. It appears to us that Exemption 5 contemplates that *the public's access to internal memoranda will be governed by the same flexible, common sense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies*. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents. 410 U.S. 73, 91 (Emphasis added.)

This same approach should be taken in this case. This Court should not permit the withholding of excise tax private letter rulings and technical advice memoranda, which constitute final opinions, statements of policy or interpretations of law which have been adopted by the IRS, nor index-digest cards and certain files, correspondence and communications which may relate to

taxable or non-taxable transactions or articles. Such opinions, statements and interpretations of law and the index-digest cards are generated by the IRS, are contained in its files, in most cases are never referred to in an excise tax "return" and are not required by law to be attached to an excise tax "return." As this Court succinctly stated in *Renegotiation Board v. Grumman Aircraft Engineering Corporation*, 421 U.S. 168, 192 (1975):

The Freedom of Information Act imposes no independent obligation on agencies to write opinions. It simply requires them to disclose the opinions which they do write. *NLRB v. Sears, Roebuck & Co.* [421 U.S. 132]

The same certainly would hold true as to the other records generated by the IRS and requested by respondents. House Report No. 93-1380, 93d Cong., 2d Sess. (1974) adopted the Senate amendment, and the Conference Report likewise adopted "another unique Senate provision."<sup>19</sup>

### C. In Camera Inspection and De Novo Review.

The in camera inspection and de novo review amendments of 1974 likewise received most careful consideration, following *Vaughn v. Rosen*, 484 F.2d 820, 823-826 (C.A. D.C., 1973), *cert. denied* 415 U.S. 977 (1974). See S. Rep. No. 854, 93d Cong., 2d Sess. 13-16 (1974). The same Report, at page 17, states:

<sup>19</sup> Joint Committee Print, *Freedom of Information Act and Amendments of 1974* (P.L. 93-502), Source Book: Legislative History, Texts and Other Documents: House Committee on Government Operations, Subcommittee on Government Information and Individual Rights and Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, at 116 (1975).



By expressly providing for in camera inspection regardless of the exemption invoked by the government. (sic) S. 2543 would make clear the congressional intent—implied but not expressed in the original FOIA—as to the availability of in camera examination in all FOIA cases. This examination would apply not just to the labeling but to the substance of the records involved.

A goodly portion of Congressional consideration of the in camera judicial inspection procedure was in its relation to the amendment of Exemption 1, more especially in the light of the holding in *Mink*, 410 U.S. 73 (1974).<sup>20</sup> However, as lucidly summarized by the Attorney General:

The 1974 Amendments modify the national defense and foreign policy exemption of the Act, 5 U.S.C. 552(b)(1), and add an express provision concerning in camera judicial inspection of records sought to be withheld under *any* exemption including exemption 1. . . . The provision concerning in camera judicial inspection affects the manner in which a court may treat classified records which an agency seeks to withhold. A.G. Memo at 1. (Emphasis added.)

#### D. Attitude of Petitioner During 1972 Hearings.

In connection with the 1972 Hearings previously mentioned, the Staff of the Subcommittee submitted a number of questions to the IRS in advance of the hearings. One of such questions related to the justification of the IRS not disclosing private letter rulings

<sup>20</sup> See H. R. Rep. No. 1380, 93d Cong., 2d Sess. 8-9 (1974) (Conference report identical); S. Rep. No. 854, 93d Cong., 2d Sess. 13-17, 28-31 (1974); Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, Pt. I-A, 3, 4 (February, 1975).

with identifiable details deleted. The IRS answered that such disclosures would be a "time consuming and expensive process" and "would be of no benefit to anyone."<sup>21</sup>

Still another question was:<sup>22</sup>

35. Under what legal authority does the Internal Revenue Service deny requests for copies of your unpublished tax rulings *after the deletion of any information that would identify the taxpayer(s) involved?* (Emphasis added.)

The IRS answered:<sup>23</sup>

35. We find no provision in the Freedom of Information Act requiring the deletion of identifying materials from unpublished tax rulings which are not of precedential significance.

Contrast the answers to these questions with the following statement by Senator Hruska on the Senate floor<sup>24</sup> on the "reasonably segregable portion" amendment to Section 552(b):

The provision dealing with deletion of segregable portions of records is procedural and requires the agency to segregate the disclosable portion of a record from the nondisclosable and to grant access to the disclosable portion. *This provision reflects existing law*, but is incorporated in this bill to clarify and emphasize the point. Being procedural in nature, it does not aid in the substantive

<sup>21</sup> Hearings on U.S. Government Information Policies and Practices, *supra*, n. 11, at 2037.

<sup>22</sup> *Id.* at 2038.

<sup>23</sup> *Id.* at 2047.

<sup>24</sup> 120 Cong. Rec. S9317-18 (daily ed. May 30, 1974).

analysis whether a particular exemption applies to a record or portions thereof. Instead, it applies once the court determines that portions of a record are disclosable, requiring the agency to divulge those portions. Thus, it would not apply where, for instance, an entire file was exempt such as under exemption 7. (Emphasis added.)

Both *Bristol-Myers Company v. Federal Trade Commission*, 424 F.2d 935, 939 (C.A.D.C.) *cert. denied*, 400 U.S. 824 (1970), cited in the Attorney General's Memorandum on the 1974 FOIA Amendments, and *Welford v. Hardin*, 315 F. Supp. 768, 770 (D.D.C. 1970) supported Senator Hruska's position, and both antedated the foregoing answers of the IRS by approximately two years. See also the remarks of Senator Kennedy at 120 Cong. Rec. S9313 (daily ed. May 30, 1974), n. 17, *supra*, 62.

In continuing his outline of changes effected by S. 2543, Senator Kennedy stated:

Sixth. In camera and de novo review. Presently de novo review with in camera inspection of documents is allowed in all cases except where withholding is justified as being in the interest of national defense or foreign policy. This exception is dictated by the Supreme Court's interpretation of the Freedom of Information Act in the case of *Environmental Protection Agency against Mink*. S. 2543 would reverse *Mink* and extend full in camera judicial review to all areas, including those involving classified documents. 120 Cong. Rec. S9313.

Applying the foregoing legislative history to the records sought in this case by respondents, it appears clear that only if this Court should hold that every word of an excise tax private letter ruling or technical

advice memorandum, including the opinions and interpretations of law contained therein, constitute a "return" within the meaning of Section 6103, may the IRS withhold disclosure of such records. Under the present mandate of Congress as detailed aforesaid, if certain materials or matters within the record are "reasonably segregable," as are opinions and interpretations of law, then such materials or matters must be provided to respondents. This also is the view of the present Attorney General. Attorney General's Memorandum on the 1974 FOIA Amendments, at 14-15, he compares the new language at the end of Section 552(b) with the new review provision of Section 552(a)(4)(B) as follows:

In order to apply the concept of "reasonably segregable," agency personnel should begin by identifying for deletion *all* portions of the requested *document* which are to be withheld in order to protect the interest covered by the exemption or exemptions involved. The remaining material (assuming it constitutes information that is responsive to the request) must be released if it is at *all* intelligible . . . (Emphasis added.) (Footnote omitted).

Clearly, opinions and interpretations of excise tax law contained in private letter rulings and technical advice memoranda are not necessary for the mechanical computation of tax due and do not contain the requisite facts or figures to constitute a "return" required to satisfy Section 6011 of the I.R.C. *Florsheim Brothers Drygoods Co. v. United States*, 280 U.S. 453 (1930). Such opinions and interpretations may easily be separated from the name of a taxpayer, privileged and confidential statistical and financial data, is used, and any trade secrets mentioned, much the same as the



IRS has already done in the four private letter rulings set out in the Appendix, *infra*. Respondents submit that such opinions and interpretations of law are matters which are nonexempt and, therefore, reasonably segregable under Section 552(b).

Even before the 1974 Amendments were enacted, the district court in this case provided for a method of in camera review by, if necessary, a special master (A. 52-53). This procedure was suggested to the court by respondents at the trial. The court of appeals approved the procedure. (A. 78 *et seq.*)

Finally, Congress, as late as November 12, 1975, in considering the proposed Tax Reform Act of 1975, and particularly the possibility of disclosure by the IRS causing financial harm to a taxpayer whose commercial or financial information might be disclosed, offered this practical solution:

Where the structure of a transaction is disclosable but disclosure of the amounts involved is not allowed under this rule, your committee believes that in normal circumstances the application of the tax law can be fully demonstrated by using "artificial" numbers, for example, by substituting \$8X and \$9X for \$400 and for \$450. Report No. 94-658 of the Committee on Ways and Means on H.R. 10612, 94th Cong., 1st Sess. 317 (1975)

Such has been the practice of the IRS for a number of years in some of its published revenue rulings and procedures applicable to manufacturers excise tax.<sup>25</sup>

<sup>25</sup> E.g. Rev. Rule 65-154, 1965-1 Cum. Bull. 488 (computation of constructive sale price under § 4216(b) of the I.R.C. which section the IRS stresses on pages 30 and 31 of its brief); Rev. Rul. 71-170, 1971-1 Cum. Bull. 365 and Rev. Proc. 71-24, 1971-2 Cum. Bull. 552 (computation of constructive sales price under § 4216(b) (1), which

## CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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section is cited by the IRS on page 30 of its brief); Rev. Rul. 69-394, 1969-2 Cum. Bull. 206 (determination of manufacturers tax base when taxable and non-taxable articles are sold as a unit at a single price) and Rev. Rul. 70-444, 1970-1 Cum. Bull. 228, amplifying Rev. Rul. 62-68, 1962-1 Cum. Bull. 216 (computation of excise tax under § 4216(b) (1) (C)).



## APPENDIX

5 U.S.C. (1970 ed. and Supp. IV) 522 [as amended by Sections 1(b)(1) and 2(c), Pub. L. 93-502, 93d Cong., 2d Sess., 88 Stat. 1561, 1564]. Public Information: Agency Rules, Opinions, Orders, Records, and Proceedings [Italics indicate 1974 amendments]

(a) Each agency shall make available to the public information as follows:

\* \* \* \* \*

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing.

\* \* \*

(3) *Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and*

*procedures to be followed, shall make the records promptly available to any person.*

•   •   •

*(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.*

•   •   •

*(b) This section does not apply to matters that are—*

*(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;*

*(2) related solely to the internal personnel rules and practices of an agency;*

*(3) specifically exempted from disclosure by statute;*

*(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;*

*(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;*

*(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;*

*(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;*

*(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or*

*(9) geological and geophysical information and data, including maps, concerning wells.*

*Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.*

*(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.*

•   •   •   •   •

**Internal Revenue Code of 1954, as amended (26 U.S.C.)**

**§ 6103. PUBLICITY OF RETURNS AND DISCLOSURE OF INFORMATION AS TO PERSONS FILING INCOME TAX RETURNS**

*(a) Public record and inspection.—*

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, subchapter B of chapter 37, and chapter 41, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person, a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Secretary or his delegate. The Secretary or his delegate may prescribe a reasonable fee for furnishing such copy.

\* \* \*

**§ 7213. UNAUTHORIZED DISCLOSURE OF INFORMATION**

*(a) Income returns.—*

(1) *Federal employees and other persons.*—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expendi-

tures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

\* \* \*

*(b) Disclosure of operations of manufacturer or producer.*—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment.

\* \* \*

**Treasury Regulations on Procedure and Administration**

1938 Regulations, Art. 55(b)-5:

For the purposes of this article the word "returns" shall include information returns, schedules, lists, and other



written statements filed with the Commissioner designed to be supplemental to or to become a part of *income* returns. (Emphasis added.)

1941 Regulations, Sec. 29.55(b)(1)

For the purpose of this section, the word "returns" shall include information returns, schedules, lists, and other written statements filed with the Commissioner designed to be supplemental to or to become a part of *income* returns. (Emphasis added.)

1953 Regulations, Sec. 39.55-1

For the purposes of this section the word "returns" shall include information returns, schedules, lists, and other written statements filed with the Commissioner designed to be supplemental to or to become a part of *income* returns. (Emphasis added.)

**Internal Revenue Manual—Selected Sections**

(11)111

**ROLE OF TECHNICAL**

(1) The Assistant Commissioner (Technical) acts as the principal assistant to the Commissioner in providing basic principles and rules for the uniform interpretation and application of the Federal tax laws (other than alcohol, tobacco and firearms taxes under Subtitle E of the Internal Revenue Code). The function of providing basic technical rules and principles for the guidance of taxpayers and Service personnel is that of the National Office. The Regional and District Offices are, however, responsible for certain functions, such as the issuance of determination letters, that are coupled with and supplement the technical activities of the National Office. Part XI of the Manual provides policies, principles, and procedures for the execution of the foregoing responsibilities of the National Office Technical organization and those activities of the Regional

and District Offices that are directly related to the technical work of the National Office.

(2) In carrying out its mission, the Technical organization conducts a number of programs. These are reflected in functional statements set forth in IRM 1113.9.

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(11)244.2

**INDEX-DIGEST CARD FILES**

(1) *General Description.* TCR maintains index-digest cards on certain rulings, technical advice memorandums, technical studies, certain court decisions, and other pertinent material, as an aid in researching Federal tax questions. (A complete list of the types of documents indexed and/or digested appears in Exhibit (11)240-2.) There are digests of published rulings and procedures, interim ("preliminary") digests of rulings and procedures recommended for publication, and digests of rulings and other material that do not meet the standards for publication but are classified as "reference," that is, having future reference or administrative value. Opinions of the Chief Counsel's Office (GCM's) are not digested separately but are noted on the index-digest card covering the case involved. Actions on Decisions in court cases where there is a digest of the court decision in the file are also noted on the card. When a ruling or procedure is revoked, modified, amended, or otherwise affected by a subsequent ruling or procedure, that fact is noted on the card. The actual case files for rulings, technical advice memorandums, etc., digested are maintained in the Records Section and may be requisitioned in the usual manner (see IRM (11)254).

(2) *Purpose.* The index-digest cards (and the related reference case files maintained by the Records Section) enable employees to utilize prior research and to ascertain what interpretations have been made in other cases.

(3) *Designation of Rulings and Other Material for Digesting.* Rulings and other documents are classified for digesting by the initiator, subject to approval by the reviewers, when executing Form M-3514 (Publication, Environmental, and File Classification Recommendations), Exhibit (11)630-5, by checking the block beside "Revenue Ruling or Procedure" or "Reference" in Item 6 of such form. See IRM (11)633.8.

(4) *Organization of Index-Digest Card Files.*

(a) *Primary Index-Digest Card Files.* The cards on income tax, estate tax, and gift tax matters are filed according to the 1954 and 1939 Code sections to which they relate, with further breakdowns under subsections and, in some instances, under subject. Cards involving employment and excise taxes are filed under index headings based on subject matter.

(b) *Auxiliary Card Files.* In addition to the primary index-digest card files, the following auxiliary card files are maintained.

1 Index-digest cards on income, estate, and gift tax matters, filed by case name or other designation.

2 Cards on employment and excise tax matters showing name of case, date, Branch symbols, and index headings. These are filed by case name.

3 Index cards for all Revenue Rulings and Revenue Procedures (filed by number of Ruling or Procedure) on which are recorded the name of the case on which the Revenue Ruling or Procedure is based, the date of the letter ruling issued in the case, the symbols of the originating Office, the Internal Revenue Bulletin citation, and, if the ruling is subsequently revoked, superseded, modified, or amplified, a notation to that effect.

4 GCM number cards (filed by GCM number) which cross-reference each GCM relating to a particular ruling.

5 Cards on numbered announcements published in the Internal Revenue Bulletin containing short digests of the announcements, showing the IRB citation, and the title of the announcement file (if any), and filed by subject and by announcement number.

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(11)610

(11)611 NATURE AND PURPOSE

The Internal Revenue Service issues interpretations to taxpayers concerned in order to advise them or their authorized representatives, upon written request, of the proper application to specific situations of the provisions of the internal revenue laws, related statutes and regulations, or Revenue Rulings and other precedents published in the Internal Revenue Bulletin. This is done to promote voluntary compliance with, and consistent administration of, the internal revenue laws in accordance with the intent and purpose of Congress.

(11)612 SCOPE

(1) The Service answers written inquiries of individuals and organizations, whenever appropriate in the interest of sound tax administration, advising them as to their status for tax purposes and as to the tax effect of their acts or transactions. The procedures described in this Chapter are applicable to those written requests for rulings, or determination or opinion letters, (other than those relating to alcohol, tobacco and certain firearms taxes) from taxpayers or their representatives as to the position of the Service in determining the tax consequences of a specifically described transaction, act, situation, etc.

(2) If a request for a ruling, or a determination or opinion letter, is so lacking in facts as to preclude a precise determination of the tax consequences, the reply may supply such information as appears to be relevant on an



assumptive basis where it is believed that general information will suffice. However, such reply shall state that sufficient facts have not been furnished for a specific ruling, or determination or opinion letter, to be issued.

(3) The interpretation of tax convention provisions by the Service will reflect, so far as principles of interpretation of treaties generally permit, the spirit, substance and broad objectives of the convention. The Service will accept interpretations placed by a foreign tax convention country on its revenue laws that do not affect the tax convention. However, when such interpretation conflicts with a provision in the tax convention, reconsideration of that interpretation may be requested.

(4) Inquiries received from taxpayers, tax practitioners, Members of Congress, and others that relate to the position of the Service on broad problems or that constitute general inquiries are not covered in this Chapter, but are handled under the general correspondence rules. See IRM (11)260.

#### (11)613 DEFINITIONS

##### (11)613.1 RULING

A "ruling" is a written statement issued to a taxpayer or his authorized representative by the National Office that interprets and applies the tax laws to a specific set of facts. Rulings are issued only by the National Office. The issuance of rulings is under the general supervision of the Assistant Commissioner (Technical). It has been largely redelegated to the Directors of the Income Tax Division and the Miscellaneous and Special Provisions Tax Division and, in turn, to the Branches in those Divisions. See IRM (11)631.

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##### (11)616.2 AREAS IN WHICH RULINGS ARE ISSUED BY THE NATIONAL OFFICE

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(3) In employment and excise tax matters (except excise taxes imposed under Chapter 42 of the Code), the National Office issues rulings with respect to prospective transactions and to completed transactions either before or after the return is filed. However, the National Office will not ordinarily rule with respect to an issue, whether related to a prospective or a completed transaction, if it knows or has reason to believe that the same or an identical issue is before any field office (including any branch office of the Appellate Division) in connection with an examination or audit of the liability of the same taxpayer for the same or a prior period.

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#### (11)633.3

##### PREPARATION OF RULING LETTER

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(5) The ruling letter should resolve fully all issues, be in language as nontechnical as the circumstances will permit, be technically accurate, legally sound, as concise as is feasible without sacrificing clarity, and should contain an explanation of the reasons for the conclusions reached if the ruling is adverse. (See IRM (11)633.7 for instances where a separate file memorandum is required.) Where it is necessary in the letter to refer to some particular section of the law or regulations, such section is usually quoted in order that there may be no misunderstanding as to the language thereof. Should the taxpayer cite an authority that is not considered controlling as to the issue presented and the position being taken on the issue is adverse, the ruling letter should distinguish the cited authority from the issue presented provided it is necessary to do so in support of our position. This is particularly true of Revenue Rulings, regulations, and court decisions the Service has acquiesced in or otherwise announced it will follow that appear to bear closely on the issue. Where an issue has been extensively briefed with numerous citation of authorities, normally only those authorities bearing most



directly on the issue need be distinguished. Where the circumstances of the case indicate the propriety of furnishing the taxpayer with any published guide material available for distribution, such material should be enclosed.

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(11)712

## AUTHORITY

(1) The Assistant Commissioner (Technical), acting under a delegation of authority from the Commissioner of Internal Revenue, is exclusively responsible for providing technical advice on any issue involving the establishment of basic principles and rules for the uniform interpretation and application of tax laws under the jurisdiction of the Internal Revenue Service.

(2) The authority to issue technical advice has been re-delegated to the Branches in the Income Tax Division and the Miscellaneous and Special Provisions Tax Division, within their respective areas of jurisdiction.

(11)713

## TECHNICAL ADVICE DEFINED

(1) *Technical advice* is advice or guidance furnished by Technical in response to a request from a district office as to the interpretation and proper application of internal revenue laws, related statutes, and regulations to a specific set of facts involved in:

(a) The examination of a specific taxpayer's return or consideration of a taxpayer's claim for refund or credit;

(b) The proposed revocation or modification of a ruling to a taxpayer; or

(c) A proposed revocation of tax-exempt status.

(2) Certain other matters referred to technical are considered technical advice. See IRM (11)71(11).1:(6), (7), and (8).

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(11)721

## REQUESTING TECHNICAL ADVICE

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(2) Taxpayers may initiate requests for technical advice in accordance with the following:

(a) During the course of an examination or a conference in a District office, a taxpayer or his representative may request that an issue be referred to the National Office for technical advice on the grounds that a lack of uniformity exists as to the disposition of the issue, or that the issue is so unusual or complex as to warrant consideration by the National Office. While taxpayers are encouraged to make written requests setting forth the facts, law, and arguments with respect to the issue, and reasons for requesting National Office advice, a taxpayer may make the request orally.

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(11)722.7

## PREPARATION OF TECHNICAL ADVICE MEMORANDUM AND TRANSMITTAL MEMORANDUM

(1) *General:*

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(d) It is the general practice of the Service to furnish a copy of the technical advice memorandum to the taxpayer, upon his request, after it has been adopted by the District Director. However, where no definitive answer is given to the specific question presented, where the factual submission is such as to indicate that the issue should be decided by the district office, where it would not be in the interest of a wise administration of the tax laws, or where the taxpayer was not advised of the request for technical advice (IRM (11)721:(3)(g)), a copy of the technical advice memorandum will not be furnished the taxpayer. In those situations the technical advice memorandum contains a statement that a copy of the technical advice memorandum will not be made available to the taxpayer.

## Private Letter Rulings

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...  
...

June 20, 1950

Gentlemen:

Reference is made to your letter dated April 13, 1950, requesting information as to whether a network radio program with local cut-in identifying commercials is considered to be local cooperative advertising.

You state that you are now able to purchase local cut-in identifying commercials on a network radio program and would like to include this type of advertising in your local dealer advertising program. Such advertising would consist of a network radio program which local announcers for the various stations would interrupt at the beginning, middle, and closing with an announcement similar to, "See your nearest . . . dealer," or, "See your . . . dealer, John Jones Motors, located at 123 A Avenue, Portland, Oregon."

It is the position of the Bureau that the local cut-in identifying commercials described above may be considered to be local advertising and the cost of such commercials may be included in the cooperative advertising plan approved by the Bureau in a ruling dated June 1, 1949.

Very truly yours,

...

Charles J. Valaer  
Deputy Commissioner.

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....  
....

March 5, 1951

Gentlemen:

Reference is made to your letter dated December 27, 1950, requesting a ruling as to the application of manufacturers' excise tax to your charges to dealers located within areas covered by television broadcasts advertising your products, and to your letter dated December 11, 1950, addressed to "Zones and Dealers", which was left with this office at the conference held on December 18, 1950.

You state that a charge of . . . per automobile is made to dealers located within "live" broadcast areas, and a charge of . . . per automobile is made to dealers located within delayed (Kinescope) broadcast areas. No such charge is made to dealers located outside these areas, and you advance reasons as to why television advertising should be considered as local advertising.

It is the opinion of the Bureau that network television programs, such as your "Holiday Hotel" program, do not represent a form of local advertising, even though the broadcast areas are restricted to the effective range of each network station involved.

Inasmuch as your charges for television network advertising appear to be made to dealers on a compulsory, non-refundable basis, it is held that such charges must be included as a part of your sales . . . price on which tax is computed. However, if you subsequently readjust your price to a dealer by allowing him an amount for actual expenses he incurs for announcements by his local station during breaks in a network program, a properly supported claim for credit or refund may be allowed for the proportionate amount of tax applicable to the readjustment in sale price.

Very truly yours,

/s/ CHARLES J. VALAER  
Charles J. Valaer  
Deputy Commissioner

....  
 ....  
 ....  
 ....

July 21, 1947.

Gentlemen:

Reference is made to your letter dated June 17, 1947, requesting advice as to whether a separate charge for co-operative advertising may be excluded from the sales price for the purpose of computing tax under section 3403 of the Internal Revenue Code, as amended.

This charge is credited to the dealer's individual account and all expenditures for local advertising in one area are charged to that account or where there are two or more dealers in the same town the contributions are maintained in a joint account against which expenses for local advertising are charged. The principal advertising mediums are local newspapers and billboards.

A copy of the dealer's sales agreement was submitted with your letter. In the case of billboard advertising charged to a joint account, the names of the dealers do not appear but the advertisement states "See your local dealer." If an individual dealership is terminated the unspent portion of his contribution remains in the joint account for the benefit of the remaining and succeeding dealers. Where the dealer has an individual account his remaining contribution is refunded upon termination of his dealership.

It has been held that separate charges for local advertising may be excluded from the sale price for the purpose of computing tax under the above section of the Code on sales of automobiles provided such charge is shown separately on the invoice and provided the cost of the local advertising equals or exceeds the amount charged. Tax is properly due on any amounts charged and collected as local advertising and not actually expended for that purpose.

It is, therefore, held that the charge for local advertising in the instant case both with respect to joint and individual dealership accounts may be excluded from the sale price for the purpose of the tax so long as the amounts involved are expended for local advertising only.

Very truly yours,

/s/ D. S. BLISS  
 D. S. Bliss  
 Deputy Commissioner



...  
...  
...

Jan 31, 1964

T:R:Ex:SM

...

Attention: ...

Gentlemen:

The District Director of Internal Revenue, . . . has referred to this office your letter which was in response to our letter to you of May 9, 1962. In that letter, we requested additional information concerning your products in order that we might determine whether, for purposes of the manufacturers excise tax, your sales of such products come under the special rule provided by section 4216(b)(2) of the 1954 Internal Revenue Code.

Prior to October 1, 1962, the applicability of the special rule to any article, subject to the manufacturers excise taxes depended, in part, upon provision (C) of section 4216(b)(2), which required that "the normal method of sales for such articles within the industry is not to sell such articles at retail or to retailers, or combinations thereof." However, provision (C) was amended by Public Law 87-858, C.B. 1962-3, 206, effective October 1, 1962, to remove this requirement with respect to all articles subject to an ad valorem manufacturers excise tax with the exception of (1) automobiles, trucks, etc., (2) business machines, and (3) matches. Thus, any articles subject to ad valorem manufacturers excise taxes, other than those falling within these three categories, are no longer subject to provision (C) with respect to sales made on and after October 1, 1962.

With respect to automobile "parts or accessories", which are taxable under Code section 4061(b), Revenue Ruling 63-105, Internal Revenue Cumulative Bulletin 1963-1, page 244, concludes that the automobile "parts or accessories"

industry comes within the scope of condition (C) during the period January 1, 1959, through September 30, 1962. Accordingly, in the case of articles which are taxable under the provisions of section 4061(b) of the Code, the tax may be computed under the special rule with respect to sales at retail or to retailers during that period by manufacturers, producers, or importers who qualify under conditions (A), (B), and (D) of section 4216(b)(2).

The latest information submitted by you indicates that you manufacture both taxable and nontaxable automotive products. You indicate that your taxable products consist of the articles listed below.

- (1) Articles subject to the tax imposed by Code section 4061(a) on automobile truck bodies and chassis:

Truck Platforms

- (2) Articles subject to the tax imposed by Code section 4061(b) on automobile "parts or accessories":

Hydraulic Truck Conversion Hoists

Hydraulic Truck Ramp Hoists

Truck Cab Protectors

Truck Approach Plates

Truck Combination Bumper and Approach Plates

Truck Dock Loading Leg

Truck Tie Down Hooks

Truck Tool Boxes

Truck Light Cluster Sets

Truck Mud Flaps

Truck Stop Tail and Turn Signal Lights

Truck Trailer Hitch

Truck Tire Carriers

Other information submitted indicates that you sell the above articles to wholesale distributors and to dealers (who,

we presume are persons who resell to consumers). Statistics furnished by you reveal that your sales to dealers have constituted approximately 15 to 30 percent of your total sales of these articles during the past four years, indicating you are regularly engaged in selling to dealers.

You state that all your sales are transactions at arm's length and that the prices on your products have been determined without record to tax benefit under the special rule of Code section 4216(b)(2). You also state that the list prices of your products are the same to all distributors and dealers and that your distributor discounts are 40 percent off the list prices while your dealer discounts are 20 percent off the list prices.

Based on that information submitted and the stated facts, we have determined that you meet the requirements of provisions (A), (B) and (D) of Code section 4216(b)(2) with respect to your sales of automobile "parts or accessories." Therefore, since, subsequent to October 1, 1962, provision (C) is no longer applicable to such articles, you may use the special rule in computing your tax with respect to your sales of parts and accessories on and after that date. Furthermore, since the automobile "parts or accessories" industry met the requirement of provision (C) prior to October 1, 1962, the special rule would also apply to sales of such articles for the period January 1, 1959, through September 30, 1962. In accordance with Code section 4216(b)(2), the tax on your sales to dealers should be computed on the lower of (1) the actual price for which you sell the articles, or (2) the highest price for which you sell the articles to wholesale distributors. In either case, the price is subject to the adjustments for containers, transportation, local advertising, etc., provided by sections 4216(a) and 4216(f) of the Code.

With respect to your sales of "truck platforms", since such articles are subject to the tax imposed by Code section 4061(a) on automobile truck bodies and chassis, sales of

these articles must still meet the requirements of provision (C) of the special rule. Information available to this office indicates that the normal method of sales for articles taxable under Code section 4061(a) is to sell such articles at retail, to retailers or dealers, or combinations thereof, rather than to wholesale distributors. Consequently, it is our determination that this industry does not qualify for the special rule under section 4216(b)(2). Therefore, it is concluded that the special rule does not apply to your sales of the "truck platforms" and the tax on the sales of these articles should be computed on the actual price for which they are sold to wholesale distributors and dealers, subject to the aforementioned adjustments provided by Code sections 4216(a) and 4216(f).

Very truly yours,

/s/ BERNARD H. FISCHGRUND  
Bernard H. Fischgrund  
Chief, Excise Tax Branch

...

...

1-29-64

**Exh. (11)700-2 Technical Advice Memorandum**

**INTERNAL REVENUE SERVICE**  
**NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM**  
 (Original and copies date stamped by T:PS:T)

District Director  
 (Name of District Office)  
 Taxpayer's Name:  
 Taxpayer's Address:  
 Taxpayer's Identification No.:  
 Years Involved:  
 Date of Conference: (OR No Conference Held)

**Issues**

State the issues as presented by the District. Also, whenever appropriate, state in clear, precise language any additional issues that have been identified that were not specifically raised by the incoming correspondence, or restate the issue presented by the District to pinpoint the real question to be decided.

**Facts**

The statement of facts incorporated in the technical advice memorandum should be set out concisely but without any sacrifice of clarity. The essential facts should be fully presented. Short quotations from the incoming statement may be used as an aid in definitely pinning down particular areas when the conclusion depends on the interpretation of such language. However, lengthy quotations from documents contained in the file are to be avoided wherever practicable.

**Applicable Law**

This part of the document should set forth clearly and concisely the pertinent law, regulations, published rulings of the Service, and case law or other precedent. Care should

be taken that all citations are directly in point. Quotations which are helpful may be used judiciously, but lengthy ones are to be avoided wherever practicable.

**Rationale**

Sufficient rationale must be provided to bridge any gaps between the issue, law, and conclusion reached.

**Conclusion**

A specific statement as to the conclusion reached with respect to each issue is the final important step. These conclusions must be written to leave no doubt as to their meaning and to make it clear they are based solely on the facts presented.

(If a copy of the technical advice memorandum is not to be given to the taxpayer, that fact should be noted here.)

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In summary, it is our function to promote uniformity, clarity, and responsiveness and, to the extent practicable, to insure an orderly method of approaching a technical advice problem. It is not intended in any way to restrict originality or ingenuity on the part of the writer, nor is it intended to prevent necessary or desirable deviation from the pattern where proper.

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Form 720

(Rev. Jan. 1974)  
Department of the Treasury  
Internal Revenue Service

## Quarterly Federal Excise Tax Return

Use to report  
Excise Taxes  
for 1974.

## Part I

Facilities and Services	Rate	Tax	IRS No.	Products and Commodities	Rate	Tax	IRS No.
Toll telephone service . . . . .	8%		22	Sugar . . . . .	(*)		60
Teletypewriter exchange service . . . . .				Diesel fuel and special motor fuels . . . . .	(*)		61
Local telephone service . . . . .				Gasoline (manufacturers tax) . . . . .	4¢ gal.		62
Transportation of persons by air . . . . .	8%		26	Fuel used in noncom- mercial aviation { Fuel other than gasoline . . . . .	7¢ gal.		69
Use of international air travel facilities . . . . .	\$1.00 per passenger		27	Gasoline (retailer tax) . . . . .	3¢ gal.		14
Transportation of property by air . . . . .	5%		28	Lubricating oil . . . . .	6¢ gal.		63
Polices issued by foreign insurers . . . . .	(*)		30	Tires { highway vehicle type . . . . .	10¢ lb.		66
				other . . . . .	1¢ lb.		67
				Inner tubes . . . . .	10¢ lb.		68
				Thread rubber (ramieback) . . . . .	5¢ lb.		68
<b>Manufacturers</b>							
Truck, bus, and trailer chassis and bodies; tractors . . . . .	10%		33				
Parts or accessories for trucks, etc. . . . .	8%		48				
Fishing rods, etc., and artificial lures, etc. . . . .	10%		41				
pistols and revolvers . . . . .	10%		32				
Firearms . . . . .	11%		46				
Shells and cartridges . . . . .	11%		49				

TOTAL TAX (Enter here and in item 1 below.)

\*See instructions on page 2.

## Part II

1. Total tax. (Before making entries in items 1 to 5, compute your total tax in Part I above.) . . . . .
2. Adjustments. (See instructions. Attach statement explaining adjustments.) . . . . .
3. Tax as adjusted. (Item 1 plus or minus item 2.) . . . . .
4. (a) Record of Tax Liability. (See instructions on page 4.) . . . . .

Period	Amount of Liability	Date of deposit	Amount
<b>First Month</b>			
1st-15th day			
16th-last day			
Total for month			
<b>Second Month</b>			
1st-15th day			
16th-last day			
Total for month			
<b>Third Month</b>			
1st-15th day			
16th-last day			
Total for month			

- (c) Total Liability for Quarter . . . . .
- (d) Final deposit made for quarter (see note under item 7) . . . . .
- (e) Total deposits for quarter (including final deposit made for quarter) . . . . .
5. Overpayment from previous quarter . . . . .
6. Total deposits (item 4(e) plus item 5) . . . . .
7. Undeposited taxes due (item 3 less item 6; this should be \$100 or less). Pay to Internal Revenue Service . . . . .
- Note: If undeposited taxes due at the end of the quarter are more than \$100, the entire balance must be deposited. This deposit must be entered in the deposit schedule above in item 4(d).
8. If item 6 is more than item 3, enter excess here \$ . . . . . and check if you want it: ☐ applied to your next return, or ☐ refunded to you.
9. If not liable for returns in succeeding quarters, write "FINAL" here . . . . . and return this form to your Internal Revenue Service Center.

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete.

Signature  Title (Owner, etc.)  Date

Please enter your name, address, employer identification number, and calendar quarter of return, if not printed. (If not correctly printed, please change.)

Quarter ending

Employer identification number

If your address is now different from previous return, check here ☐

Please return this form to your Internal Revenue Service Center  
(See last item of instructions, "Where to File").

Form 720 (Rev. 1-74)

## INSTRUCTIONS

You must file a return for each quarter whether or not you incurred any liability. If you have no tax to report, enter "None" in item 3.

**Adjustments.**—Generally, an adjustment may be allowed for all the taxes reported on Form 720 to correct mathematical errors or to adjust payments of tax on transactions, charges, or processing that are entitled to be made tax free.

Enter in item 2 the total of any adjustments claimed. If you claim an adjustment, attach a statement explaining the basis for it and state that you have the required supporting evidence. You must identify the IRS Numbers being adjusted, and the amount of adjustment claimed for each.

**Records.**—Keep on file at your principal place of business or some other convenient location, duplicate copies of your return and accurate records and accounts of all transactions. They must contain sufficient information to indicate whether the correct amount of tax has been computed and paid. Also, keep records and information in support of all adjustments claimed and all exemptions. In the case of most taxes reportable on Form 720, keep your records at least four years from the date: (1) the tax becomes due, (2) the tax is paid, (3) an adjustment is claimed, or (4) a claim for refund is filed, whichever is later. If required, your records must be available for inspection by the Internal Revenue Service.

## MANUFACTURERS

These taxes apply to the sale or use by the manufacturer, producer, or importer of the articles listed.

**Basis for tax and adjustments.**—Generally, the tax is computed on the price for which the taxable article is sold or leased. If a taxable article is sold or leased under a conditional sales contract, installment payment contract, or chattel mortgage arrangement, compute and pay tax on each payment received during the quarter covered by the return. For exclusion from the sale price of finance charges, consult your District Director. Consult him also on special rules that apply to the lease of any article.

If charges for transportation, delivery, insurance, and installation are included in the manufacturer's sale price, you may adjust the price by deducting the actual amount paid or incurred for such expenses. For the circumstances under which adjustments may be made and about the evidence required to support such adjustments, consult your District Director or the applicable regulations. Adjustment of the manufacturer's sale price may also be made for discounts, rebates, and other similar allowances granted to the purchaser. But such discounts, etc., may not be anticipated. Adjustments may only be made if the purchaser has taken advantage of the discount, etc., before the return is required to be filed.

If the adjustments are made or the required evidence is obtained after the return is filed, the amount of tax involved may be considered an overpayment and you may then take a credit for that amount on a later return, or file a refund claim.

Tax shall be computed on a price established by the Commissioner of Internal Revenue if an article is sold by the manufacturer or producer at retail, on consignment, or otherwise than through an arm's-length transaction at less than the fair market price, or if the article is used by the manufacturer or producer in a manner subject to tax.

• • •

#### DEPOSITARY METHOD OF PAYMENT

If you are liable in any calendar quarter for more than \$100 of excise taxes, you are required to make semimonthly, monthly or quarterly deposits with an authorized commercial bank depositary or a Federal Reserve bank, in accordance with specific instructions below.

If you are liable for \$100 or less of taxes for a calendar quarter (or your total liability for a calendar quarter, less any deposits for the quarter, is \$100 or less), you must either pay the taxes with your quarterly return or deposit them with an authorized commercial bank or Federal Reserve bank.

• • •

#### WHEN TO FILE

A return must be filed for each quarter of the calendar year as follows:

Quarter covered	All excise taxes other than trans. and comm. due on or before	Trans. and comm. due on or before
January, February, March .....	April 30 .....	May 31
April, May, June .....	July 31 .....	August 31
July, August, September .....	October 31 .....	November 30
October, November, December .....	January 31 .....	February 28

For all excise taxes other than those on transportation and communications, you are allowed an additional 10 days for filing your return if it shows timely deposits in full payment of the taxes due for the quarter.

• • •

LAW OFFICES  
WEBSTER & KILCULLEN  
1747 PENNSYLVANIA AVENUE, N.W.  
SUITE 1000  
WASHINGTON, D.C. 20006  
(202) 785-9500  
June 26, 1973

GEORGE D. WEBSTER  
JOHN L. KILCULLEN  
T. NEAL COMBS  
ARTHUR L. HEROLD  
WILLIAM I. ALTHEN  
S. W. ZANOLLI  
DAVID S. SMITH

OF COUNSEL, HARRY S. DENT

Mr. Donald C. Alexander,  
Commissioner of Internal Revenue  
Internal Revenue Service  
1100 Constitution Avenue, N.W.  
Washington, D.C. 20224

Attention: CP:CD

In re: Request for Inspection and Copying of Documents  
under the Freedom of Information Act

Dear Mr. Alexander:

The undersigned, individually and jointly, request permission to inspect and copy the following documents pursuant to the Freedom of Information Act, as amended, 5 U.S.C. § 552, and Treasury Regulations, § 601.702, 26 C.F.R.:

- (1) All unpublished private rulings and/or letter rulings originating in the Miscellaneous and Special Provisions Tax Division, Excise Tax Branch, of the Office of Assistant Commissioner (Technical),

Internal Revenue Service, which were issued between January 1, 1947 and to the date hereof to manufacturers of automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semi-trailer chassis, truck and bus trailer and semi-trailer bodies, and tractors of a kind chiefly used for highway transportation in combination with a trailer or semi-trailer, or to any trade association of any one or more such manufacturers, in which determinations were made of:

- (a) All items includable or excludable in the price for which a taxable article is sold under § 4216(a) of the Internal Revenue Code (or any predecessor section) and any Regulations issued pursuant thereto.
- (b) The methods, means, formulae or procedures for determining or computing by a manufacturer of taxable articles of the applicable constructive sales price, under § 4216(b), § 4216(b)(1), and § 4216(b)(2), of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued pursuant thereto, upon sales by such manufacturer to:
  - (1) a retailer
  - (2) a wholesaler
  - (3) a wholesale distributor
  - (4) a user or ultimate consumer
- (c) The existence or non-existence under § 4216(b) of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued pursuant thereto, particularly (without limitation) Treasury Regulations Section 148.1-5 and Treasury Regulations 46(1940),



Sections 316.8, 316.10, 316.12, 316.13, 316.14 and 316.15, of:

- (1) a retailer
  - (2) a wholesaler
  - (3) a wholesaler distributor
  - (4) sales at retail
  - (5) sales at wholesale
  - (6) sales to wholesale distributors
- (d) The methods, means, formulae, or procedures for determining or computing by a manufacturer of taxable articles of the applicable exclusion of local advertising charges from the sales prices of taxable articles under § 4216 (f) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.
- (e) The methods, means, formulae, or procedures for determining or computing by a manufacturer of taxable articles of the credit for tax paid on tires or inner tubes under § 6416(c) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.
- (f) The definition of the term "the purchase price" as used in § 6416(c)(1) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.
- (g) The definition(s) of taxable and non-taxable trailers, semi-trailers, truck and bus trailers and semi-trailer chassis, truck and bus trailer and semi-trailer bodies and containers under

§ 4061(a) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

- (h) The methods, means, formulae or procedures for computing the applicable tax under Sections 4061(a) and 4216(b) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto on a projected or estimated basis instead of upon an article by article basis.

As used in these requests, the terms "private rulings and/or letter rulings" include (without limitation) both ordinary letter rulings, unpublished private rulings, and those portions of the responses to Technical Advice requests that are or were intended for issuance to taxpayers.

- (2) The files including correspondence analysis and submissions of fact applicable to the issuances of:

Revenue Ruling 62-68,	1962-1 CB 216
Revenue Ruling 68-254,	1968-1 CB 479
Revenue Ruling 68-202,	1968-1 CB 477
Revenue Ruling 68-519,	1968-2 CB 513
Revenue Ruling 69-394,	1969-2 CB 206
Revenue Ruling 54-25,	1954-1 CB 258
Revenue Ruling 54-448,	1954-2 CB 412
Revenue Ruling 54-61,	1954-1 CB 259
Revenue Ruling 283,	1953-2 CB 425
Revenue Ruling 62-221,	1962-2 CB 251
Revenue Ruling 63-238,	1963-2 CB 519
Revenue Ruling 58-287,	1958-1 CB 426
Revenue Ruling 60-241,	1960-2 CB 329
Revenue Ruling 59-74,	1959-1 CB 350
Revenue Ruling 59-163,	1959-1 CB 353
Revenue Ruling 65-9,	1965-1 CB 491
Revenue Ruling 60-185,	1960-1 CB 412
Revenue Ruling 69-580,	1969-2 CB 209

Revenue Ruling 69-568, 1969-2 CB 209  
 Revenue Ruling 71-240, 1971-1 CB 372  
 Revenue Ruling 68-509, 1968-2 CB 508  
 Revenue Ruling 70-54, 1970-1 CB 218  
 Revenue Ruling 73-231, IRB 1973-21,11

- (3) Communications with respect to these private rulings and/or letter rulings received by the Internal Revenue Service from persons outside the Executive Branch of the United States Government (including, without limitation, members of Congress, Congressional staff members, and persons acting on behalf of the parties seeking rulings), together with the responses of the Internal Revenue Service to these outside communications. The communications requested include (without limitation) letters, conference memoranda, and memoranda of telephone conversations.
- (4) So much of the letter ruling indexing system(s) of the Internal Revenue Service as will enable us to ascertain whether additional unpublished private rulings and/or letter rulings, similar to those described in Paragraph 1 above, have been issued by the Treasury. Specifically (but without limitation), we have in mind (a). the "Precedent File" (and/or the "Reference File") which we understand is classified and indexed by the Excise Tax Branch by (Internal Revenue) Code Sections, and (b). the "Non-Precedent File", which we understand is maintained by the Excise Tax Branch chronologically and alphabetically by names of the taxpayers.

It is our expectation that the requested materials will not contain any data that can reasonably be characterized as "trade secrets and commercial or financial information" within the scope of subsection (b)(4) of 5 U.S.C. § 552;

however, if the requested materials contain secrets or information of this sort, we individually and jointly consent to the deletion of this data prior to the release of the material. Please keep in mind, when undertaking to make deletions, that it is our object to ascertain (1) what private rulings and/or letter rulings were issued during the period specified above applicable to the subject matter more fully set out in Paragraph 1 above, and (2) to whom, and (3) what the unpublished private rulings and/or letter rulings held, and (4) the bases and/or arguments for and/or against such holdings.

This request does not relate to "inter-agency or inter-agency memorandums or letters" within the scope of subsection (b)(5) of 5 U.S.C. § 552. Specifically, we are not requesting those portions of the responses to Technical Advice requests which are or were intended for the guidance of Internal Revenue Agents. However, access is requested to those portions of Technical Advice requests that are or were intended for issuance to taxpayers.

Reasonable charges for copying the requested documents will be paid. If it appears that the copying charges will amount to \$50.00 or more, please notify us so that we can comply with the provisions of Treasury Regulations § 601.702(c)(5), relating to contracts for payment of copying fees.

The addresses of the undersigned and of our attorneys for notification purposes are as follows:

Fruehauf Corporation,  
 P. O. Box 238,  
 Detroit, Michigan 48232

William E. Grace,  
Fruehauf Corporation,  
P. O. Box 238,  
Detroit, Michigan 48232

Robert D. Rowan,  
Fruehauf Corporation,  
P. O. Box 238,  
Detroit, Michigan 48232

George D. Webster, Esq.,  
Webster & Kilcullen,  
1747 Pennsylvania Avenue, N.W.,  
Washington, D. C. 20006

Milton J. Mehl, Esq.,  
Mehl, Williams, Cummings & Truman,  
2012 Continental Life Building,  
Fort Worth, Texas 76102

In order to be of assistance to you, we furnish you the following names of some of the manufacturers who may have requested private rulings and/or letter rulings with reference to the subject matters covered by Paragraphs 1 and 2 above:

1. American Motors Corporation, 14250 Plymouth Road, Detroit, Michigan 48232
2. Black Diamond Enterprises, Inc., Euclid Avenue, Bristol, Virginia 24201
3. Brown Trailer Division, Clark Equipment Company, P. O. Box 410, Michigan City, Indiana 46360
4. Chrysler Corporation, Box 1919, Detroit, Michigan 48231
5. Dana Corporation, P. O. Box 58, Chelsea, Michigan 48118
6. Dorsey Trailers, Inc., Elba, Alabama, 36323

7. Ford Motor Company, Inc., American Road, Dearborn, Michigan 48121
8. General Motors Corporation, 3044 W. Grand Boulevard, Detroit, Michigan 48202
9. Gindy Manufacturing Corporation, Downingtown, Pennsylvania 19335
10. The Heil Company, Box 593, Milwaukee, Wisconsin 53201
11. Highway Industries, Inc., Highway Trailer Div., 405 E. Fulton St., Edgerton, Wisconsin 53534
12. Lufkin Trailers, Division of Lufkin Industries, Inc., P. O. Box 848, Lufkin, Texas 75902
13. Peabody Galion Corporation, Box 607, Galion, Ohio 44833
14. Perfection Cobey Company, Division of Harsco Corp., South East Street, Galion, Ohio 44833
15. Strick Corporation, 225 Lincoln Highway, Fairless Hills, Pennsylvania 19030
16. Utility Trailer Manufacturing Co., P. O. Box 1299, City of Industry, California 91747
17. Timppe, Inc., 5990 N. Washington St., Denver, Colorado 80216
18. Trailmobile Division, Pullman Incorporated, 200 S. Michigan Avenue, Chicago, Illinois 60604

Your prompt attention in this instance is appreciated.

Very truly yours,

FRUEHAUF CORPORATION, and  
WILLIAM E. GRACE, and  
ROBERT D. ROWAN



/s/ By: GEORGE D. WEBSTER  
*Attorney*

/s/ By: MILTON J. MEHL  
*Attorney*

GDWand MJM:bj

cc: Mr. Peter P. Weidenbruch, Jr.  
Assistant Commissioner (Technical),  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, D. C. 20224

cc: Mr. John F. Hanlon,  
Assistant Commissioner (Compliance),  
Internal Revenue Service,  
1111 Constitution Avenue, N.W.  
Washington, D. C. 20224

INTERNAL REVENUE SERVICE  
Washington, D.C. 20224  
July 24, 1973

In reply refer to: CP:D

Mr. George D. Webster  
Webster & Kilecullen  
1747 Pennsylvania Avenue, N.W.  
Suite 1000  
Washington, D.C. 20006

Dear Mr. Webster:

This responds to the June 26, 1973 letter signed by you and Milton J. Mehl as attorneys for Fruehauf Corporation, William E. Grace, and Robert D. Rowan, requesting permission pursuant to the Freedom of Information Act to inspect and copy a variety of letter rulings, technical advice memoranda, and other records pertaining to the confidential tax affairs of eighteen identified and also unidentified taxpayers. In addition your letter requested permission to inspect and copy various intra-agency memoranda and workpapers pertaining to twenty-three published Revenue Rulings. We also have a July 17, 1973 letter signed by you and Mr. Mehl on the letterhead of Mr. Mehl's law firm.

To the extent your request seeks "routine" but not "reference" files of letter rulings and technical advice memoranda, our records of dispositions indicate that excise tax "routine" files for years prior to 1959 and for certain later years are no longer in existence. In addition we have no practicable way of ascertaining the existence of "routine" excise tax files for unnamed taxpayers. With respect to any identifiable records covered by your request, it would appear that exemptions under the Freedom of Information Act apply.

Exemptions in 5 U.S.C. 552(b) applicable to your request include matters that are (3) specifically exempted from disclosure by statute including 26 U.S.C. 6103 and 7213 and 18 U.S.C. 1905, (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential, (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency, and (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency. These exemptions are asserted and your request is denied.

Reference is also made to H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966), stating:

• • • an agency may not be required to make available for public inspection and copying any advisory interpretation on a specific state of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases.

For excise tax matters the index-digest reference card file is indexed by subject matter. These files include digests of letter rulings and technical advice memoranda classified as "reference", and other items such as Revenue Rulings, court cases, and technical studies, which are indexed for internal reference purposes. A substantial portion of the letter rulings and technical advice memoranda are classified as "routine" and indexed only by the name of the taxpayer.

It is also the position of the Internal Revenue Service that until an interpretation is published in the Internal Revenue Bulletin it has not been adopted by the Service. The Bulletins are published and copies offered for sale and the interpretations set forth therein are indexed in the

monthly, quarterly and semi-annual editions and each Cumulative Bulletin has an Index. Additionally, there is an Index-Digest System that provides finding lists and topically arranged digests of items published in the Bulletins. Accordingly, we believe that the Service has met the requirements of 5 U.S.C. 552(a)(2) with respect to indexing those interpretations which have been adopted by the Service and are not published in the Federal Register.

At any time within 30 days after the date of this letter, you may file an appeal of our determination to the Commissioner of Internal Revenue. The appeal must be in the form of a statement signed by the appellant and mailed to the Commissioner of Internal Revenue, 1111 Constitution Avenue, N.W., Washington, D.C. 20224. The statement must contain: (1) The appellant's name and address, (2) The identification of the records requested, (3) The date of the request and the date of the letter denying the request, and (4) A request that the Commissioner consider the denial.

In the event of denial upon appeal, the Freedom of Information Act makes judicial review available in the U.S. District Court in the District in which the complainant resides, or has a principal place of business, or in which the agency records are situated. To the extent that the records you request exist, they would be under control of the National Office, Washington, D.C.

You may be aware that questions about the index-digest reference card files, letter rulings and technical advice memoranda under the Freedom of Information Act were considered in *Tax Analysts and Advocates v. Internal Revenue Service*, Civil No. 841-72 (D. D.C.), June 6, 1973 order and opinion by the court which has been stayed pending a decision by the Government as to appeal.

In addition many of the documents requested are denied as prohibited from disclosure by 26 U.S.C. 6103 and the

regulations thereunder. These regulations at 26 C.F.R. 301.6103(a)-1(a)(3) provide a broad definition of "return" which encompasses letter rulings, that portion of technical advice memoranda furnished taxpayers, communications with taxpayers relating to letter rulings and technical advice memoranda, as well as information on index-digest reference cards and other documents referring to the tax affairs of identified taxpayers. The prohibition in section 6103 of the Internal Revenue Code and the regulations covers much of the manufacturers excise tax matters you request.

Copies of this letter are being mailed to the parties you indicate in your letter as shown below.

Sincerely,

/s/ JOHN F. HANLON  
John F. Hanlon  
Assistant Commissioner  
(Compliance)

cc: Mr. Milton J. Mehl  
Mehl, Williams, Cummings & Truman  
2012 Continental Life Building  
Fort Worth, Texas 76102

Fruehauf Corporation  
P. O. Box 238  
Detroit, Michigan 48232

William E. Grace  
Fruehauf Corporation  
P. O. Box 238  
Detroit, Michigan 48232

Robert D. Rowan  
Fruehauf Corporation  
Detroit, Michigan 48232

# DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE

WASHINGTON, D.C. 20224

August 22, 1973

In reply refer to: C

Mr. George D. Webster  
Mehl, Williams, Cummings & Truman  
20th Floor, Continental Life Bldg.  
Fort Worth, Texas 76102

Dear Mr. Webster:

This is in response to your letter of July 30, 1973, in which you appeal the determination of Assistant Commissioner Hanlon denying your request to inspect and copy a variety of letter rulings, technical advice memoranda, and other records.

Your request and appeal have been carefully considered. It is believed, however, that Mr. Hanlon properly denied your request and his determination is affirmed. In addition it is our view that a court in the proper exercise of its equity jurisdiction under the Freedom of Information Act would not require production of the records requested.

With respect to *Tax Analysts and Advocates v. Internal Revenue Service*, Civil No. 841-72 (D. D.C.), an order has been entered to stay the June 6, 1973 order of the court during the pendency of an appeal filed on behalf of the Service.

Sincerely,

/s/ DONALD C. ALEXANDER  
Donald C. Alexander  
Commissioner



**No. 75-679**

Supreme Court, U. S.

**FILED**

**MAR 30 1976**

MICHAEL ROBAR, JR., CLERK

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1975**

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**INTERNAL REVENUE SERVICE, PETITIONER**

**v.**

**FRUEHAUF CORPORATION, ET AL., RESPONDENTS**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT**

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**SUPPLEMENTAL APPENDIX TO BRIEF  
FOR THE RESPONDENTS**

---

**JOHN L. KING**

**MATTHEW C. MCKINNON**

2600 Detroit Bank & Trust Bldg.

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Chicago, Illinois 60603

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1747 Pennsylvania Ave., N.W.

Washington, D. C. 20006

*Attorneys for Respondents*

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## APPENDIX

### IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ALLSTATE INSURANCE COMPANY,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

Civil Action No. 60-C-322

### DOCKET ENTRIES

3/ 1/60	Filed complaint and 5 copies	mg
3/ /60	Issued Summons and 5 copies with 5 copies of complaint (JS 5)	sw
3/ 9/60	Filed Summons. Retd servd as to US Atty. (1 serv)	\$2.00 Ej
5/ 2 60	Filed Answer	(4) H
1/ 9/61	Filed Notice and Motion for lv to file amend- ed complaint	(2)(2)
1/ 9/61	Enter order motion for lv to file amended com- plaint instr. granted—Perry, J. (DRAFT) (1)	
1/ 9/61	Filed Amended Complaint and Exhibits (11, E	
2/ 3/61	Enter order to extd time for filing Gvts Answer to the Amended Complt to and incl. Feb 23, 1961 by agreemt granted.—Perry, J. Mld ntes 2-8-61	Ej
2/23/61	Filed answer to amended complaint	(4) t



- 9/11/61 Leave to plttf to fl mo for summ judgt instr.  
Govt to file answer thereto within 15 days.  
Briefs 20-20 anf 10.—Perry, J.  
Mailed notices. 9-14-61 ht
- 9/11/61 Filed Motion for summary judgment and Affidavit in support thereof. (2, 9)ht
- 9/11/61 Filed Entry of appearance of addl. counsel (1) ht
- 9/26/61 Filed Defendant's Cross Motion for summary judgment and affidavit (2, 1) E
- 10/ 9/61 Fld Stipulation. (1) I
- 10/10/61 Filed Notice of Motion, Plaintiff's Motion for continuance to permit deposition to be taken and Affidavit. (2,2,2) ht
- 10/17/61 By agrmt motion for summary judgment proceedings contd to Oct. 23, 1961—Parsons, J.  
Mld ntes 10-26-61. II
- 10/23/61 Plff given until Nov. 6, 1961 to file brief as to admissibility of assertions in affidavit, deft given until Nov. 13, 1961 to answer. Hearing on briefs set for Nov. 20, 1961—Parsons, J.  
Mld ntes 11-8-61. t
- 11/ 6/61 Filed Brief in support of plttf's motion to strike. & Certif of Service wk
- 11/ 6/61 Filed Stipulation & Certificate of Service (2) ht
- 11/10/61 Motion to strike affidavit of asst. commissioner Schwartz denied. Hearing on compliance of affidavit set for 12-11-61; Parsons: n.m. 11-28-61. O
- 11/14/61 Enter order for leave to file brief for the Deft. in opposition to Pltffs. motion to strike affidavit of assistant commissioner—Parsons, J.  
Mld. ntes 11-29-61. sw

- 11/14/61 Filed brief for the Deft. in opposition to Plaintiff's motion to strike affidavit of assistant commissioner. (25) EH
- 11/17/61 Filed Certificate of Service. ht
- 11/17/61 Filed plttf's reply to brief for the deft. in oppsn to pltffs motion to strike affidavit of assistant commissioner. ss
- 12/11/61 Mo of plttf to strike affidavit of deft allowed. Cause contd to Jan. 5, 1962 for report on status & to set for trial—Parsons, J.  
Mld ntes 12/20/61 sp
- 12/19/61 Clerk's File Copies of Transcript of Proceedings had before Judge Parsons on Nov. 20, 1961 and Dec. 11, 1961 filed by official court reporter.
- 9/22/61 Reassigned Judge Parsons (43) (14) ht
- 1/ 2/62 Filed Deposition of Harold T. Swartz.
- 1/ 4/62 Filed Notice of motion and Pltffs motion for production of documents. (2,9) ht
- 1/ 5/62 Leave to plntff. to amend motion for production of documents, instanter. Deft. given until Jan. 10, 1962 to file brief in opposition to plntff's motion to produce and affidavit of Commissioner of Internal Revenue. Plntff. to file concurrent brief on executive privilege issue.  
Hearing on plntff's motion for production of documents set for Jan. 11, 1962 at 2 P.M. Parsons, J. P  
Mld. Ntes. 1/19/62.
- 1/11/62 Lv gv plttf to suggest voluntarily question of conflict of interest of its own counsel; Court referred matter to Dept of Justice for review & recomm. Lv. gv plttf to file affidavits showing

no conflict of interest. Gov reports on its review of matter & suggested its finding of no conflict of interest in accord with government's finding & lv gv attys for plttf to proceed in cause. Deposition of Harold T. Swartz filed of record taken as evid in supp of deft's mo for summary judgt. Plttf files exhibits AB&C in evid, in opposition. Govt gv until Feb 5, 1962 to file brf in supp of its mo for summary judgt. Plttf gv until Feb 19, 1962 to file ans brf. Gov gv until Feb 26, 1962 to file reply brf. Cs cont'd for further hrg on mo for summary judgt & ruling on March 15, 1962—Parsons, J.

Mld ntes 1/24/62.

sp

1/11/62 Filed Deft's brief in opposition to plntff's motion to produce. p

1/11/62 Filed Affidavit of William Cromartie. p

1/11/62 Filed Affidavit of Charles W. Davis. p

1/10/62 Filed Plaintiff's brief iln; opposition to deft's claim of executive 28 pp. plus certificate of service, 1 p. SB

2/ 2/62 On joint motion of counsel for plttf and deft. this Court's Minute Order dated Jan. 11, 1962 is hereby amended, nunc pro tunc, to read as follows: Leave given to plaintiff to suggest voluntarily, question of conflict of interest of its own counsel; Court referred matter to Department of Justice for review and recommendation. Leave given to plaintiff to file addits showing no conflict of interest. Government reports on its review of matter and suggested its Finding of no Conflict of interest; order entered finding

no conflict of interest in accord with Government's finding, and leave given to attorneys for the plaintiff to proceed in cause. Deposition of Harold T. Swartz, filed of record taken as evidence in support of defendant's motion for summary judgment, subject to plaintiff's objections as to competence and relevancy. Plaintiff files exhibits A, B and C in evidence, in opposition. Government given until February 5, 1962 to file brief in support of the existence of the asserted administrative practice. Plaintiff given until Feb. 19, 1962 to file answering brief. Government given until Feb. 26, 1962 to file reply brief. Cause contd to March 15, 1962 for further hearing and ruling on competency of Govt's. evidence to prove existence of asserted administrative practice.—Parsons, J.

Notices mailed.

Draft (2) ht

2/ 5/62 Fld. Brief for the deft. in support of its proof of Administrative Practice. p

2/21/62 Fld motion, certificate of service. (1)(1)

2/19/62 Fld brief for plff in opposition to compliance and relevance of evidence offered by Govt to prove administrative practice. co

2/21/62 Order that the time to file Govt's reply brief extd to March 5, 1962 DRAFT (1,2) Parsons, J. t Mld ntes 3/6/62.

3/ 5/62 Fld supplemental brief for deft in support of its proof of administrative practice. t

1/23/62 Clerks file Copy of Transcript of Proceedings had on 1-11-62 before Judge Parsons filed by official Court Reporter. (74)

- 2/20/62 Pur. to order ent'd letter of Department of Justice, dated Feb. 7, 1962, addressed to this Court, be filed in the record of this case as additional statement of the govt in support of its position taken relative to counsel representing Allstate Insurance Co. DRAFT Parsons, J. t Ntes mld.
- 2/28/62 Clerk's File Copy of Transcript of Proceedings had on Jan. 5th 1962 before Judge Parsons filed by Official Court Reporter. (50) E
- 3/15/62 Filed plaintiffs reply to supplemental brief for the deft in support of its proof of Adminis. practice. sp
- 3/15/62 Lv granted plttf to file instanter its reply to defts supplemental brief in support of its proof of administrative practice. Order cause contd for hearing on admissibility of govt's proof in support of administrative practice on March 28, 1962 at 2:00 P.M.—Parsons, J. E  
Mld Ntes 3-16-62. D
- 3/20/62 Filed Stipulation concerning certain corrections to be made in the transcript of the deposition of Harold T. Swartz.
- 3/26/62 On motion of the Govt. order es reset for argument on April 10, 1962 at 2:00 P.M.—Parsons, J. E  
Mld Ntes. 3-29-62. D
- 4/ 6/62 On courts own motion es reset for hrg on admissibility of Governments proof in support of administrative practice on April 17, 1962 at 2:00 P.M.—Parsons, J. E  
Mld. Ntes. 4-9-62. D

- 4/17/62 Arguments on admissibility of govt's proof in support of administrative practice heard & concluded. Matter taken under advsmt. Parsons, J. p  
Mld. Ntes. 4-18-62. ed
- 4/26/62 Filed Clerks Copy of Transcript of Proceedings had on 4-17-62 of Official Court Reporter. JMD
- 7/31/62 Pursuant to memo opinion and order ent objections of Allstate Ins Co to the admission of Schwartz deposition and letter rulings into evidence are overruled. Trial briefs will be filed by the parties on the merits of the case and cause set down for oral arguments on Oct. 26, 1962 (DRAFT)(3)—Parsons, J. E  
Mld. Ntes 8-1-62. R
- 8/ 3/62 Plaintiffs brief in support of mo for sum judgment due Aug. 20, 1962; defts brief in opposition and in support of cross mo for sum judgment due Sept. 10, 1962; plttfs reply brief and brief in opposition to defts cross motion for sum judgment due Sept. 20, 1962 defts reply to plaintiffs brief in opposition to cross motion for sum judgment due Sept. 30, 1962. Oral arguments reset from Oct. 26 to Nov. 2, 1962 at 2:00 PM—Parsons, J. E  
Mld. Ntes. 8-6-62. D
- 8/20/62 Fld. Brief in support of plttf's mo. for Summary judgment.
- 9/11/62 Filed Brief for deft. wek
- 9/18/62 Due date for plttfs reply brief and brief in opposition to defts cross motion for summary judgment ext to Oct 1, 1962; due date for defts reply to plttfs brief in opposition to cross motion



for summ judgment ext to Oct 11, 1962—Parsons, J. E

Mld Ntes 9-20-62.

10/ 1/62 Filed Plaintiffs Reply to Brief for the deft on cross motions for summary judgment. (153) E

10/ 8/62 Enter order to extend time for filing government's reply brief to and including Oct 22, 1962 by agreement. Parsons, J. E

Mld Ntes. 10-8-62. mam

10/22/62 Filed Reply Brief for the deft. E  
(Delvd to Judge Parsons Drawer). E

11/ 2/62 Enter order oral arguments on motion for summary judgment contd to Dec. 7, 1962 at 2:00 P.M.—Parsons, J. E

Mld. Ntes. 11-5-62. mam

11/16/62 Enter order reset date for oral argument from Dec. 7, 1962 to Dec. 17, 1962 at 2:00 P.M. Parsons, J. E

Mld. Ntes. 11-19-62. mam

12/17/62 Enter order—oral arguments on motion for summary judgment contd to Jan. 18, 1963 at 2:00 P.M.—Parsons, J. E

Mld. Ntes. 12-19-62. mam

1/14/63 On courts own motion order es set for ruling on motions for summary judgment on Feb 1, 1963 at 2:00 P.M.—Parsons, J. E

Mld. Ntes. 1-15-63. mam

1/30/63 On court's own motion date of Feb. 1, 1963 set for ruling on motions for summary judgment vacated. Copy of court's ruling will be forwarded to parties by mail. Parsons, J. t

Mld ntes. 1/31/63. m

3/29/63 In accord with memorandum opinion to be filed hereafter and to be forwarded to parties, motion of deft U.S.A. for summary judgment is allowed and motion of plttff Allstate Ins Co for summary judgment is denied—Parsons, J. E  
Mld. Ntes. 4-1-63. (DRAFT) (7) JS-6 m

5/17/63 Filed Motion to correct apparent typographical error in memorandum opinion and order.

5/17/63 On motion of parties it is ord that all references to Sec. 24.12 of Treasury Regulations 129 contained in the court's memorandum opinion and order dated March 29, 1963 shall be and are hereby changed to Sec. 24.14 of Treasury Regulations 129. Parsons, J. (DRAFT) E  
Mld. Ntes. 5/20/63. m

5/24/63 Filed plaintiff's notice of appeal. \$5.00 pd

5/24/63 Filed stipulation dispensing with bond on appeal.

5/24/63 Mailed copy of notice of appeal to U.S. Atty. J. P. O'Brien. G

5/29/63 Enter order amending court's written opinion dated March 29, 1963 to correct citation of Kaiser v. U.S.A. as 262 Fed. 2nd 367, and not as 252 Fed. 2nd 434. Parsons, J. t  
Mld ntes 5/31/63. m

6/27/63 Filed stipulation re extending appeal.  
Order extending time for filing record on appeal and docketing the appeal by 2 weeks, from July 3 to July 17, 1963 on stipulation. Draft. Parsons, J.

Mailed notice 7/1/63. G

# DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

(Caption and Formal Parts Omitted)

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendant, the United States of America, hereby cross-moves this Court to enter summary judgment in its favor dismissing plaintiff's complaint with prejudice.

The grounds for this motion are that the pleadings of the parties, the stipulation of the parties, the attached affidavit of Harold T. Swartz, and certain statements in the affidavit of M. A. Poss attached to plaintiff's motion show that there is no genuine issue as to the material facts of this case, and that the defendant is entitled to judgment as a matter of law.

James P. O'Brien  
United States Attorney

## AFFIDAVIT

(Caption and Formal Parts Omitted)

The undersigned, Harold T. Swartz, being duly sworn, states as follows:

1. That he is an Assistant Commissioner of Internal Revenue in charge of the Office of Assistant Commissioner (Technical), and that by virtue of his office he has in his custody the files of the Internal Revenue Service indicating administrative practice as carried out by the national office of the Internal Revenue Service in administering the revenue laws.

2. That, based upon an inspection of these files, to the best of his knowledge and belief, it has been the administrative practice of the Internal Revenue Service since at

least 1945 to permit an insurance company subsidiary to conform its accounting period to a parent on fiscal year accounting period for the purposes of filing a consolidated return.

3. That the mechanics of how this has been typically allowed was, generally, as follows: A consolidated return including the income of both the parent and the subsidiary insurance company for the parent's normal fiscal year would be allowed, provided that the parent changed to a calendar year basis for the immediately following year. The subsidiary insurance company would be required to file a short taxable period return for the part of its prior calendar year up to the start of the parent's fiscal year. A short taxable period consolidated return would then be filed for the remaining part of this following calendar year.

4. That, to the best of his knowledge and belief, based upon an inspection of the files in the custody of his office, this administrative practice of allowing the conforming of a subsidiary insurance company's accounting period to the fiscal period of its parent for consolidated returns purposes in the manner outlined above has been followed consistently since at least 1945.

/s/ *Harold T. Swartz*  
Harold T. Swartz  
Assistant Commissioner of  
Internal Revenue

Sworn to and subscribed before me, this 22nd day of September, 1961.

/s/ *Nina B. Baber*  
Notary Public  
My Commission expires  
3-31-66.

## PLAINTIFF'S MOTION FOR PRODUCTION OF DOCUMENTS

(Caption and Formal Parts Omitted)

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiff hereby moves this Court to order defendant to produce and permit the inspection and copying of the following designated documents:

1. Memorandum dated October 30, 1946 from the Deputy Commissioner of the Income Tax Unit of the Bureau of Internal Revenue to the Chief Counsel of the Bureau of Internal Revenue, described at page 118 of the transcript of the deposition of Assistant Commissioner of Internal Revenue Harold T. Swartz, taken on December 19, 1961.

2. Any files which may be located in the office of the Chief Counsel of the Internal Revenue Service pertaining to the ruling letters which appear as Defendant's Exhibits 1 through 7, so marked for identification during the taking of the deposition of Assistant Commissioner Swartz.

3. The GCM written by the office of the Chief Counsel of the Internal Revenue Service to the Chief of the Bulletin Branch of the Internal Revenue Service sometime in 1956 or early 1957, described at pages 151-153 of the transcript of the deposition of Assistant Commissioner Swartz.

4. The letter written by the Tax Rulings Division of the Internal Revenue Service in Washington to the District Director of Internal Revenue at Chicago in reply to a request for technical advice in connection with plaintiff's case, described at pages 162-165 of the transcript of the deposition of Assistant Commissioner Swartz.

If defendant so requests, plaintiff has no objection to an order requiring the production of copies of these documents in which the names of the taxpayers involved are obliterated or excised.

The grounds for this motion are as follows:

Defendant has asserted the existence of an administrative practice within the Internal Revenue Service under which plaintiff and its parent, Sears, Roebuck and Company, would have been granted permission to file a consolidated tax return for the fiscal year ending January 31, 1951 if they had applied to the Commissioner of Internal Revenue for permission to do so.

In an attempt to prove the existence of such a practice, defendant took the deposition of Assistant Commissioner of Internal Revenue Harold T. Swartz on December 19, 1961. During the course of that deposition, copies of seven ruling letters to individual taxpayers from 1944 through 1956, found in the files of the Assistant Commissioner of Internal Revenue for technical matters, were marked for identification and Assistant Commissioner Swartz testified that these letters proved the existence of the asserted practice. Obviously, the circumstances under which these rulings were issued, including the reasoning of the responsible personnel in the Internal Revenue Service in issuing these letters, is highly relevant in determining the existence of the practice and, particularly, whether it was consistently followed and whether it would have been followed if Allstate and Sears had applied for permission to file a consolidated tax return for the fiscal year ended January 31, 1951. While Assistant Commissioner Swartz described, in a general way, the contents of the files relating to the ruling letters, the designated documents were not made available to plaintiff. These documents are highly relevant for the following reasons:



1. *The October 30, 1946 Memorandum from the Deputy Commissioner of the Income Tax Unit of the Bureau of Internal Revenue to the Chief Counsel of the Bureau of Internal Revenue.* On October 10, 1946, the Deputy Commissioner of Internal Revenue issued a ruling letter to the affiliated group of taxpayers involved denying permission to the affiliated group to file a consolidated return for the fiscal year ended September 30, 1946. (Def's. Ex. 4-B.) On October 15, 1946, the affiliated group requested reconsideration of its request for permission to file a consolidated tax return for that fiscal year. (Def's. Ex. 4-C.) On February 5, 1947, the Deputy Commissioner issued a ruling to the affiliated group granting permission to file a consolidated return for the fiscal year ended September 30, 1946. (Def's Ex. 4.) Assistant Commissioner Swartz testified that, before this ruling was issued, it was submitted by the Deputy Commissioner to the Chief Counsel for interpretation and review because a strict interpretation of the regulations would have led to denial of the right to file a consolidated return for that period and the Deputy Commissioner wanted to see whether the Chief Counsel agreed, legally, with the administrative position proposed to be taken by the Deputy Commissioner. (Tr. 120-121.) The Deputy Commissioner's memorandum to the Chief Counsel, described by Assistant Commissioner Swartz at page 118 of the transcript of his deposition, production of which is sought by plaintiff, is obviously relevant because it may disclose why the Deputy Commissioner adopted the position he did in the February 5, 1947 ruling. It should be noted that Assistant Commissioner Swartz summarized the contents of the Deputy Commissioner's October 30, 1946 memorandum to the Chief Counsel during the course of his deposition (Tr. 119, 121) and there is no good reason why plaintiff should not be allowed to see the document itself, rather than accept his summary thereof.

2. *Files from the Office of the Chief Counsel of the Internal Revenue Service Pertaining to the Seven Ruling Letters.* It appears that the ruling letters which were marked as Defendant's Exhibits 1, 2, and 4 of Assistant Commissioner Swartz' deposition were submitted to the Chief Counsel of the Bureau of Internal Revenue for review and approval before they were issued. (Swartz Dep., Tr. 186-187.) This indicates that there may be files within the office of the Chief Counsel which will shed light on the reasons for the issuance of the rulings alleged to constitute an administrative practice and yet no effort was made by Assistant Commissioner Swartz to examine the files of the Chief Counsel's office. (He even admitted that there may be pertinent files in the Chief Counsel's office.) (Tr. 96-99.) Furthermore, during the course of the deposition, Swartz was asked whether his office contained any files relating to one of the ruling letters (Def's. Ex. 2), other than the file then in Swartz' hands, and one of Swartz' aides, Mr. Levine, motioned to a file which was in front of him and counsel for defendant indicated that there were other pertinent files, though not in the "custody" of the Assistant Commissioner. (Tr. 96-97.) Since the Commissioner's office referred at least three of the seven proposed rulings to the Chief Counsel for review and approval, and since it is apparent that the Chief Counsel's office contains files which may shed light on the reasons for the issuance of the ruling letters, production of the Chief Counsel's files is imperative before this Court can be asked to pass on the existence of the asserted administrative practice.

3. *The GCM Written by the Office of the Chief Counsel of the Internal Revenue Service to the Chief of the Bulletin Branch of the Internal Revenue Service Sometime in 1956 or Early 1957.* The ruling letter which appears as Defendant's Exhibit 7 for identification was pro-

posed for publication, but publication was scotched by the office of the Chief Counsel in a memorandum to the Chief of the Bulletin Branch which stated, *in part*, that the "proper solution to the problem presented should be effected in amendment to the consolidated regulations." (Tr. 151-152.) One of plaintiff's main arguments in connection with the motion to strike Assistant Commissioner Swartz' affidavit was that the privilege to file a consolidated return could be granted only by a published regulation, not by anything less, such as a published or an unpublished ruling. The extract from the Chief Counsel's memorandum squelching publication of Defendant's Exhibit 7 indicates that the Chief Counsel agreed with plaintiff's position and plaintiff is entitled to see the entire text and reasoning of the Chief Counsel's GCM, which is obviously highly relevant and may constitute an admission against interest.

4. *The Letter Written by the Tax Rulings Division of the Internal Revenue Service in Washington to the District Director of Internal Revenue at Chicago in Reply to a Request for Technical Advice in Connection with Plaintiff's Case.* During the course of Swartz' deposition, it was revealed that at some time the office of the District Director at Chicago submitted a request for technical advice to the national office in connection with plaintiff's case and that the national office responded, discussing the question of whether and under what circumstances a fiscal year parent and a calendar year subsidiary insurance company may file consolidated returns. It also was shown that answers to requests for technical advice are handled in exactly the same manner as taxpayers' requests for ruling. (Tr. 162, 165-169.) Indeed, one of the documents relied upon by defendant to prove the existence of the administrative practice is not a ruling letter to an individual taxpayer, but an answer to a request for tech-

nical advice. (Def's. Ex. 1.) Obviously, the discussion of the privilege to file consolidated returns contained in the answer to the request for technical advice in plaintiff's case is as relevant (indeed, more relevant) as Defendant's Exhibit 1 or the private letter rulings (Def's. Exs. 2-7) in determining the policy of the Internal Revenue Service with respect to this question. Furthermore, it may contain important admissions against interest.

Therefore, for good cause shown, plaintiff is entitled to inspect and copy the designated documents.

/s/ Charles W. Davis  
Charles W. Davis

/s/ Edward W. Rothe  
Edward W. Rothe  
Attorneys for Plaintiff  
One North La Salle Street  
Chicago 2, Illinois  
Telephone: FInancial 6-3900

*Of Counsel*

William A. McClintock, Jr., Esq.  
Hopkins, Sutter, Owen, Mulroy & Wentz

#### MEMORANDUM OPINION AND ORDER

This is an action by Allstate Insurance Company to recover income taxes and interest totaling \$3,445,257.68 which were allegedly erroneously assessed and collected by the United States of America from Allstate for the years 1950-1953. The dispute in this case is whether or not Allstate is entitled to determine its Korean War excess profits tax credits for the years 1950-1953 by computing its average base period net income according to the alternative growth method prescribed in Subsection 435(e), which was added to the Internal Revenue Code of 1939 on January 3, 1951.



In accordance with the understanding of the parties and the Court, this cause presents at this time for the Court's determination the issue of whether or not the deposition of Harold T. Swartz, who is the Assistant Commissioner of Internal Revenue in charge of Technical Functions, and the letter rulings are competent and relevant to prove the existence of an unpublished administrative practice whereby insurance companies, regardless of apparent conflicting provisions in the law, would be allowed to file consolidated returns with parent corporations.

It has been said that relevancy is the tendency of evidence, being of probative worth, to establish a proposition which it is offered to prove. *Texas and Pacific Railway Company v. Coutourie*, 135 Fed. 465, 469. But how strong must this tendency be? Perhaps the test is whether or not the evidence offered renders the desired influence more probable than it would be without the evidence. *Mutual Life Insurance Company v. Hillmon*, 145 U.S. 285, 295.

In applying this test to the present issue, and after carefully examining and digesting all of the briefs and pleadings on file, in addition to the oral arguments heard in open court, it is determined that the Swartz deposition and the letter rulings do tend to establish the proposition which they are offered to prove, namely, the existence of an unpublished administrative practice. It is also determined that the evidence renders the desired influence more probable than it would be without the evidence. It is further determined that the Swartz deposition was rendered by an individual legally qualified and that all of the tendered evidence is competent. The Court thus concludes that the Swartz deposition and the letter rulings are both relevant and competent. Accordingly, Allstate's objections to the admission of the Swartz deposition and the letter rulings into evidence are overruled.

The Court is not determining at this time, however, the character and nature of the administrative practice which defendant has thus far proven or whether or not as such it has attained the status of law. Nor is this Court deciding that defendant has proven by a preponderance of the evidence that an administrative practice existed which allowed insurance companies, under the circumstances of this case, to file consolidated returns with parent corporations. That is to say, this Court in no way intends at this time to indicate that the tendered evidence, though relevant and competent for the purpose of proving an administrative practice, establishes either as a matter of fact or as a matter of law that if Sears and Allstate had wished to file consolidated returns they would have been granted permission to do so. In addition, this Court is not deciding whether the unpublished administrative practice as proven is relevant to prove the existence of a "privilege" to file a consolidated return for Allstate's first taxable year ending after June 30, 1950, within the meaning of Section 435(e)(1)(A)(i). These matters can intelligently be dealt with only after a full hearing on the merits of this cause. Whether or not the administrative practice will be relevant to the issue of "privilege" depends upon the construction placed upon that term.

Accordingly, trial briefs will be filed by the parties on the merits of the case and this cause is set down for oral arguments on October 26, 1962.

Enter:

/s/ James B. Parsons

United States District Judge

Date: July 31, 1962



## MEMORANDUM OPINION AND ORDER

The parties have filed cross motions for summary judgment. Having discovered no genuine issue as to any material fact, I find that it is now proper to dispose of these motions. The undisputed facts, insofar as they are pertinent hereto, may be recited briefly as follows:

Plaintiff is a corporation organized under the laws of the State of Illinois and has its principal place of business at Skokie, Illinois. It has engaged in the business of underwriting and issuing various types of insurance policies, and during the years here in controversy it was subject to Federal income taxation under the provisions of Section 204 of the Internal Revenue Code of 1939.

All of the capital stock of Allstate is, and always has been, owned by Sears, Roebuck and Company. Sears is engaged in the business of selling all types of merchandise at the retail level. At all times here pertinent, Sears employed a fiscal year accounting period ending January 31, while Allstate employed a calendar year accounting period.

Due to the Korean War, an Excess Profits Tax Act was enacted on January 31, 1951, with retroactive effect to July 1, 1950, the purpose of which was to tax corporate profits attributable to wartime activity. At the same time, the Act provided for a number of special credits, including: (1) The credit based on invested capital (Section 436); (2) The credit based on general average earnings (Section 435[d]); and (3) The growth credit (Section 435[e]).

During the years 1950 through 1953, Allstate was required by the Internal Revenue Department to compute its excess profits tax credit according to the "general average of earnings" method. Allstate is of the opinion, however, that it should have been allowed to compute its

excess profits tax credit according to the "growth" method. Accordingly, Allstate here seeks to recover the alleged overpayment of excess profits taxes for the years 1950, 1952, and 1953 in the amount of \$3,445,257.68, together with the statutory six per cent interest.

Section 435[e] [1] of the Internal Revenue Code of 1939, which sets forth the "growth" method, provides:

"A taxpayer shall be entitled to the benefits of this subsection if the taxpayer commenced business before the end of its base period, and if \* \* \* (A)(i) the total assets of the taxpayer as of the first day of its base period (when added to the total assets for such day of all corporations with which the taxpayer has the privilege under section 141 of filing a consolidated return for its first taxable year under this subchapter), determined under paragraph (3), did not exceed \$20,000,000, and (ii) the total payroll of the taxpayer (as determined under paragraph (4)) for the last half of its base period is 130 per centum or more of its total payroll for the first half of its base period, or the gross receipts of the taxpayer (as determined under paragraph (5)) for the last half of its base period is 150 per centum or more of its gross receipts for the first half of its base period: \* \* \*"

It is undisputed that Allstate met both the total payroll and gross receipts conditions. It is also undisputed that Allstate commenced business before the end of its base period. What is in dispute, however, is the assertion by Allstate that its total assets, as determined by section 435(e)(1)(A)(i), did not exceed \$20,000,000, the asset ceiling limitation placed by Congress upon the use of "growth" method. In determining Allstate's total assets one must add to Allstate's assets (which as of January 1, 1946, were \$15,381,893.70) the assets of all corporations

with which the taxpayer had the "privilege" under Section 141" of filing a consolidated return during the years in question.

Thus, if Allstate *did not* have the privilege of filing a consolidated return with Sears, then Allstate would qualify for using the growth method since its total assets would not have exceeded \$20,000,000. If, on the other hand, Allstate *did* have the privilege of filing a consolidated return with Sears, then Allstate would *not* qualify for using the "growth" method since its total assets would have exceeded \$20,000,000.

The legal issue, as stated by plaintiff, with which I am thus confronted is whether or not Allstate, which had sufficient increases in both payroll and gross receipts during its base period to qualify for the use of the alternative growth method of computing average base period net income for excess profits tax credit purposes, under Section 435(e)(1)(A) of the Internal Revenue Code of 1939, is precluded from using that method because its own January 1, 1946, assets, which were less than \$20,000,000, must be aggregated with those of its parent, Sears, Roebuck and Company, in determining compliance with the \$20,000,000 maximum asset limitation on the use of the growth formula contained in Section 435(e)(1)(A)(i) of the 1939 Code, for the reason that Allstate had the privilege of filing a consolidated return with Sears for its first taxable year ending June 30, 1950. The controversy thus hinges entirely upon the legal issue of whether or not Allstate and Sears had the "*privilege under Section 141*" of the 1939 Code of filing consolidated returns.

As the parties well realize, the proper way to deal with this problem is to examine carefully the language of the pertinent statutes. Section 435(e)(1)(A)(i) contains the phrase "privilege under section 141." Thus, if Allstate had "*the privilege under section 141*", of filing a consoli-

dated return with Sears, Allstate would not have been entitled to use the "growth" formula.

We are therefore led to Section 141 which explains when a corporation has such a privilege. Section 141(a) provides that "[a]n affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return. . . ." Paragraphs (d) and (e) define what constitutes "an affiliated group" and it appears undisputed that Allstate and Sears constituted such a group.

It will be noted also that Paragraph (a) provides that affiliated groups "*shall*" have the privilege. It thus appears that it was the intention of Congress to give such groups an unqualified privilege to file consolidated returns. The phrase which presents difficulty, however, is "subject to the provisions of this section". Although this phrase perhaps is more directly related to those provisions defining an "affiliated group", nevertheless, one cannot escape the fact that it also relates to Paragraph (b).

Paragraph (b) provides:

"The Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income and excess-profits-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability."

It is to be noted, however, that the Secretary is hereby empowered to prescribe *only* those regulations as he may deem necessary which relate to the "manner" of filing



consolidated returns. Section (b) presumes the fact that affiliated corporations have filed consolidated returns and merely grants the Secretary authority to regulate the "manner" by which the tax liability of such affiliated corporations may be most properly "returned, determined, computed, assessed, collected, and adjusted", so as to effectuate the purposes of the Act. Although counsel have done a magnificent job in briefing the exceedingly complex questions arising under their motions, and although I have never before been privileged to encounter such profound analyses and such superb argumentation as I have encountered in this cause, nevertheless, for some reason little consideration has been given to the meaning and effect of Paragraph (b) of Section 141.

It appears to me that a clear reading of Paragraph (a) of Section 141 reveals that it was Congress' definite intention to confer upon affiliated corporations such as Allstate and Sears the privilege of making consolidated returns. Insofar as the "subject to" clause relates to Paragraph (b), it was the intention of Congress to permit the Secretary to regulate the "manner" in which the privilege was to be exercised. Congress authorized the Secretary only to prescribe the "manner" (once the privilege granted by Paragraph (a) was utilized) in which the tax liability of such affiliated corporations could most properly be returned, determined, computed, assessed, collected, and adjusted. I find no language in Paragraph (b) which authorizes the Secretary to revoke or deny the privilege so affirmatively granted in Paragraph (a).

With this in mind, we may proceed to examine the pertinent regulations which plaintiff contends denied it the privilege of filing consolidated returns with Sears.

Pursuant to Paragraph (b) of Section 141, the Secretary had promulgated Section 24.14 of Treasury Regulations 129, which requires subsidiaries, such as Allstate, to

adopt the accounting period of the parent, such as Sears, (which in this case would be a fiscal year period) if it wished to file a consolidated return. Standing alone, this regulation appears valid. A problem arises, however, when considering Section 29.204-1 of Treasury Regulations 111 in light of Section 24.14, for the former regulation requires insurance companies such as Allstate to follow a calendar year accounting method. This regulation too, by itself, appears valid. Yet, the *effect* of the two regulations is to deny Allstate the privilege of filing consolidated returns, something which is quite contrary to the provisions of Paragraph (a) of Section 141.

It is thus very clear that *under the regulations* Allstate and Sears did not have the "privilege" of filing consolidated returns. Nor did Allstate have the "option", as defendant contends, to file such returns under the regulations. See *Words and Phrases*, Vols. 30, 33, and 37A for definitions of words "right", "privilege", and "option". Furthermore, it is clear that the unpublished administrative practice, the proof of which has occupied so much of counsels' time and effort, did not "re-confer" upon Allstate and Sears the privilege which the regulations purportedly took away. Such unpublished rulings do not have the effect of law and I find it unreasonable to contend that such rulings, private in nature, and subject to the Commissioner's discretion insofar as precedent value is concerned, constituted a privilege. *Bartels v. Birmingham*, 332 U.S. 126; *Oberwinder v. C.I.R.*, 147 F.2d 255; *Kaiser v. United States*, 262 F.2d 367; *Pomeroy Coop. Grain Co. v. C.I.R.*, 288 F.2d 326; *Weller v. C.I.R.*, 270 F.2d 294. The practice proven merely indicates what the Commissioner had done in like situations and it merely illustrates the fact that Allstate had the "opportunity" (if it was in fact aware of such "opportunity") to "ask" the Commissioner to grant it a special privilege to file consolidated



returns with Sears, regardless of the conflicting regulations.

Be that as it may, I am nevertheless of the opinion that Sears and Allstate under Section 141 did, in the years in question, have the privilege of filing consolidated returns, the regulations notwithstanding, and that Congress so intended them to have this privilege. I am also of the opinion that Section 24.14 of Treasury Regulations 129 was null and void insofar as it applied to insurance subsidiaries whose parents did not file on a calendar year basis. The effect of this regulation was to contradict the clear purpose of Paragraph (a) of Section 141 and to that extent it was invalid from its inception—and being invalid, it could not operate to defeat the privilege conferred by Section 141(a). Although the validity of Section 24.14 of Treasury Regulations 129 insofar as it applied to insurance subsidiaries has since been restored by virtue of Section 1.1502-14(c) of the regulations under the 1954 Code, added by T.D. 6412, approved September 9, 1959 (Cum. Bull. 199), since the latter has modified the effect of the former, nevertheless, it is the opinion of the Court that had Allstate and Sears attempted to file a consolidated return in the years in question any other court would likewise have held as I am now holding. It is well established that a Treasury regulation which exceeds the legislative intent of the Act which it purports to interpret for administrative purposes is of no effect. *C.I.R. v. Aluminum Company of America*, 142 F.2d 663; *Miller v. C.I.R.*, 327 F.2d 850; *Manley v. United States*, 83 F.Supp. 79. Insofar as provisions of Treasury regulations purport to establish a rule contrary to the construction of a section of the Internal Revenue Act, such provisions are unauthorized. *C.I.R. v. Kay Mfg. Corp.*, 122 F.2d 443; *Kaufman v. United States*, 131 F.2d 854. To the extent that a regulation de-

parts from and conflicts with the meaning and purpose of a statute it is to that extent unreasonable, unauthorized and invalid. *Trust of Bingham v. Commissioner*, 325 U.S. 365; *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129; *Miller v. United States*, 294 U.S. 435. A Treasury regulation which operates to create a rule out of harmony with a statute is a nullity. *In re Town Crier Bottling Co.*, 123 F.Supp. 588; *C.I.R. v. Winslow*, 113 F.2d 418; *Granquist v. Hackleman*, 264 F.2d 9; *Boykin v. C.I.R.*, 260 F.2d 249; *Scofield v. Lewis*, 251 F.2d 123. A regulation cannot take away rights or privileges which Congress has given. *Russell Mfg. Co. v. United States*, 175 F.Supp. 159.

Accordingly, it is the opinion of the Court that defendant's motion for summary judgment should be, and the same hereby is, allowed, and that plaintiff's motion for summary judgment should be, and the same hereby is, denied.

Enter:

/s/ James B. Parsons

United States District Judge

Date: March 29, 1963

MOTION TO CORRECT APPARENT  
TYPOGRAPHICAL ERROR IN  
MEMORANDUM OPINION AND ORDER

(Filed May 17, 1963)

The parties, jointly, hereby move this Court to correct what appears to be a typographical error in this Court's Memorandum Opinion and Order dated March 29, 1963.

On pages 5 and 6 of the Memorandum Opinion and Order, the Court discusses the requirement in the Treasury Regulations that subsidiaries, such as Allstate, adopt the accounting period of the parent, such as Sears, if it wished to file a consolidated return, citing Section 24.12 of

Treasury Regulations 129. However, it is Section 24.14 of Treasury Regulations 129 which contains the requirement discussed by the Court.

In order to eliminate any possible confusion, the parties therefore request that the Court enter an order to the effect that all references to Section 24.12 of Treasury Regulations 129 in the March 29, 1963 Memorandum Opinion and Order be changed to Section 24.14 of Treasury Regulations 129.

/s/ Edward W. Rothe  
Attorney for Plaintiff

/s/ James P. O'Brien  
United States Attorney

Dated: May 17, 1963

ORDER CORRECTING TYPOGRAPHICAL ERROR  
IN MEMORANDUM OPINION AND ORDER DATED  
MARCH 29, 1963

Pursuant to the joint motion of the parties, calling to the Court's attention a typographical error in the Memorandum Opinion and Order dated March 29, 1963, it is hereby ordered that all references to Section 24.12 of Treasury Regulations 129 contained in that Memorandum Opinion and Order shall be and are hereby changed to Section 24.14 of Treasury Regulations 129.

Enter:

/s/ James B. Parsons  
United States District Judge

Dated: May 17, 1963

BRIEF FOR THE DEFENDANT IN OPPOSITION TO  
PLAINTIFF'S MOTION TO STRIKE AFFIDAVIT OF  
ASSISTANT COMMISSIONER SWARTZ

(Filed November 14, 1961)

This is an action brought by Allstate Insurance Company for the recovery of \$3,445,257.67 in excess profits tax and assessed interest for the calendar years 1950, 1952 and 1953 which it alleges to have been erroneously assessed and collected by the defendant, plus statutory interest thereon.

QUESTION PRESENTED

Whether the affidavit of Assistant Commissioner Swartz with respect to an administrative practice of the Internal Revenue Service should be stricken from the record on the grounds that such a practice, is immaterial or irrelevant to the issues in this case.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and Regulations are set out in the Appendix, *infra*.

STATEMENT

On September 11, 1961, the taxpayer filed a motion for summary judgment in this case and on September 26, 1961, the Government filed a cross-motion for summary judgment, attaching the affidavit by Harold T. Swartz, Assistant Commissioner of Internal Revenue, which is at issue on this motion. The Assistant Commissioner's affidavit asserted (par. 1) that, by virtue of his office, he had custody of the files of the Internal Revenue Service indicating administrative practice as carried out by the national office of the Internal Revenue Service in administering the revenue laws and (par. 2) that "based upon an inspection of these files, to the best of his knowledge and belief"



a certain administrative practice of the Internal Revenue Service had been followed consistently since at least 1945. (The details of this administrative practice are set out in paragraphs 2 and 3 of the affidavit.) On October 13, 1961, the taxpayer filed a motion for a continuance of the summary judgment proceedings for the purpose of taking the deposition of Assistant Commissioner Swartz. The Court held hearings on this motion on October 17, and on October 23, 1961. During the course of oral argument on October 17, Government counsel informed the Court and taxpayer's counsel that Mr. Swartz' affidavit was based upon five letter rulings issued to individual taxpayers, and the Government's counsel offered to make copies of these rulings available to taxpayer's counsel, at the Court's suggestion, in order to obviate the necessity of taking Mr. Swartz' deposition.<sup>1</sup>

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<sup>1</sup> Since Mr. Swartz' affidavit was based on these letter rulings which had been issued, and because the rulings can speak for themselves, it is the Government's view that a deposition of Mr. Swartz is unnecessary and could develop no other relevant *factual* material. Although this question has been held in abeyance by the Court pending decision of the question as to whether evidence of this unpublished administrative practice is admissible, the taxpayer has seen fit in its brief to argue for reasons why a deposition is still necessary. (Br. 6, fn. 2.) The reasons asserted are without merit. As for the question as to whether Mr. Swartz' affidavit correctly states the substance of the rulings, the Government offered to submit copies of the rulings as part of the stipulation filed November 6, 1961, so that the Court itself could decide this question. Taxpayer refused to agree to this solution. As to the question of whether these "constitute" an administrative practice, and further questions as to the "origin, rationale, availability, scope and consistency, etc.," these seem more questions for the Court, and quibbling over what the words "administrative practice" mean, than relevant factual matter for which a deposition is necessary. Of course, attempts to attack the legal basis of this practice by questioning of Mr. Swartz are obviously improper. With these comments on taxpayer's assertions set out, the Government will leave the matter to resolution at the proper time.

It was the Government counsel's understanding of the Court's purpose on the hearing of October 17 that taxpayer's counsel could examine the five letter rulings tendered to determine whether there was further reason or necessity for taking Mr. Swartz' deposition, and that taxpayer's counsel would advise the Court thereon at the hearing on October 23 and show the Court why a deposition would be needed despite the tendering of the rulings. The Government's counsel also informed the Court and taxpayer's counsel that these five letter rulings tendered were the only letter rulings in this area which had been located in the files, and offered to provide a further affidavit of Mr. Swartz to that effect.

At the hearing on October 23, taxpayer's counsel shifted his ground and presented the Court with an oral motion to strike the affidavit (under Rule 56(e) of the Federal Rules of Civil Procedure) on the grounds that the matter set out therein was irrelevant and inadmissible in evidence. Taxpayer's counsel suggested that a stipulation be filed as to the basis for Mr. Swartz' affidavit, i.e., the five letter rulings previously mentioned, the fact that these letter rulings had not been published, and that these five letter rulings represented all the requests for rulings by taxpayers since 1945 along similar lines or involving essentially the same issue. A stipulation substantially in this form was filed on November 6, 1961.<sup>2</sup>

The question, then, for the Court's decision is whether this affidavit of Assistant Commissioner Swartz with re-

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<sup>2</sup>A further search of the files of the office of Assistant Commissioner (Technical) after the hearing of October 23, in order to verify the proposed stipulation disclosed an additional ruling dated August 21, 1951, and this fact has been incorporated in paragraph 3 of the stipulation filed. A copy of this ruling has been furnished by the Government to taxpayer's counsel. No other rulings or requests for rulings since 1945 have been located.



spect to an administrative practice of the Internal Revenue Service, reflected in unpublished letter rulings to individual taxpayers, is irrelevant to the issue in this case. In order to understand this question, it is necessary to understand the issue presented by the controversy on the merits. Consequently, the Government will briefly summarize its view of the case.

The only issue to be decided in this case is whether Allstate Insurance Company, the taxpayer, was entitled to compute its excess profits credit for the taxable years 1950 through 1953, inclusive, under the so-called "growth" method prescribed in Section 435(e) of the Internal Revenue Code of 1939. If it is entitled to use this "growth" method for the computation of its excess profits credit, then the taxpayer is entitled to a refund, but if it is not and must instead use the usual "average income" method prescribed in Section 435(d), then the Commissioner's deficiency assessment was properly made, and no refund is due to the taxpayer. The point of dispute between the Government and the taxpayer with respect to the taxpayer's qualifications for the special "growth" method prescribed by Section 435(e) concerns the "total asset" test set out in Section 435(e)(1)(A)(i). The total asset test for the special "growth" method for the computation of the excess profits credit requires that the total assets of the taxpayer, as carefully defined in Section 435(e)(3), "as of the first day of its base period"<sup>3</sup> (when added to the total assets for such day of all corporations with which the taxpayer has the privilege under section 141 of filing a consolidated return for its first taxable year under this subchapter<sup>4</sup>), not exceed \$20,000,000. It is stipulated

<sup>3</sup> Since 1946 is the first base period year, the "first day of its base period" would be the first day of its 1946 year.

<sup>4</sup> The first taxable year ending after June 30, 1950.

that if the total assets of Allstate were added to those of its parent, Sears Roebuck & Company, on the applicable date, they would exceed \$20,000,000. (See stipulation filed October 9, 1961.) The question on the merits in this case, then, is whether Allstate's assets should be combined with Sears for purposes of this "total assets" test, the Government maintaining that they should be so combined, and taxpayer maintaining that they should not be and that therefore it meets the test and qualifies for the "growth" method credit.

The statutory language of the "total assets" test requires the combination of the taxpayer's assets with those "of all corporations with which the taxpayer has the privilege under section 141 of filing a consolidated return" for its first taxable year ending after June 30, 1950. It is the Government's primary position in this case that Congress, in using this language, actually intended to combine with the taxpayer's assets the assets of members of an "affiliated group" as defined in Section 141 and it is undisputed that Allstate and Sears qualified as an "affiliated group" at the applicable time. It is however taxpayer's view that the language in Section 435(e)(1)(A)(i) must be construed literally, and that Allstate must have had an actual "privilege"<sup>5</sup> of filing a consolidated return with Sears for its first taxable year ending after June 30, 1950, before its assets should be combined with those of Sears

<sup>5</sup> How the taxpayer interprets the word "privilege" is also somewhat in dispute. Assuming *arguendo* that the Court adopts taxpayer's approach to the total assets test, does the word "privilege" mean an absolute right to file a consolidated return exercisable in any event, or does it mean that taxpayer would have been allowed the special "privilege" of filing after complying with certain requirements, such as receiving permission for an accounting period change from the Commissioner?

for purposes of the total asset test. It is in connection with taxpayer's own theory of the statute, not the Government's, that Mr. Swartz' assertion of an administrative practice becomes, in the Government's view, highly relevant. Thus, to spell out the Government's position still further, it believes that the statutory "total asset" test in the language in Section 435(e)(1)(A)(i) refers to the concept of an "affiliated group", and there is no dispute that, if the Government is correct in this basic position, Allstate does not qualify for the "growth" method. If, of course, taxpayer is now willing to agree that the Government's view of the statute is the correct one, then Mr. Swartz' affidavit and the administrative practice is irrelevant. However, if the Court should adopt the taxpayer's view that the total asset test refers to Allstate's "privilege" of filing a consolidated return with Sears, had they chosen to do so,<sup>6</sup> the Court will then have to decide whether it had such a "privilege", and in such a decision, the matters set out in Mr. Swartz' affidavit become relevant.

Assuming, then, for the purposes of argument on this motion, that the total asset test refers to an actual "privilege" to file a consolidated return on the part of Allstate, it is necessary to analyze in some detail where Mr. Swartz' assertion of an administrative practice fits into the problem. According to taxpayer's argument, the obstacle preventing Allstate from filing a consolidated return with Sears for its first taxable year after June 30, 1950, is the fact that Allstate was on a calendar year accounting pe-

<sup>6</sup> While at points in its brief (e.g., p. 34) taxpayer seeks to treat the question as whether Allstate and Sears could be compelled to file a consolidated return, we are sure that taxpayer recognizes that the question even on its theory is not whether they could be forced to file such a return but whether, had they seen fit to do so, they would have been permitted to do so.

riod, whereas Sears was on a fiscal year accounting period ending January 31. Section 141(a) of the 1939 Code, which is the Congressional grant of the "privilege to file consolidated returns", provides that an affiliated group (as defined in Section 141(d)), shall have the "privilege" of making a consolidated return, that the making of a consolidated return shall be upon the condition that the members of the affiliated group consent to all of the consolidated return Regulations,<sup>7</sup> and that the making of a consolidated return is considered such a consent.

The Commissioner's applicable consolidated return Regulations provided that subsidiary corporations had to adopt an annual accounting period in conformity with the common parent in order for the affiliated group to file a consolidated return. (Treasury Regulations 129, Section 24.14.) If the taxpayer Allstate was to file a consolidated return with its parent Sears, their accounting periods would consequently have to be conformed. As pointed out above, conforming the accounting periods was the only obstacle, *if it was an obstacle*, to the filing of a consolidated return by this taxpayer.

It is essentially the taxpayer's argument that these accounting periods could not be conformed for the first taxable year after June 30, 1950, because of the provisions of Treasury Regulations 111, Section 29.204-1, that insurance companies taxable under Section 204 of the 1939 Code

<sup>7</sup> These Regulations are prescribed under the authority of subsection 141(b). Treasury Regulations 129 are applicable to taxable years ending after December 31, 1949, and are therefore the applicable consolidated return Regulations here. See Treasury Regulations 111, Section 29.141-1(a), and Treasury Regulations 129, Section 24.0(a). Congress conferred broad discretion on the Commissioner in the issuance of these consolidated return Regulations. See *Charles Ilfield Co. v. Hernandez*, 292 U.S. 62, 65.



(as Allstate was) were directed to file their returns "on the basis of the calendar year." (See Br. 12-13.) There was thus an apparent conflict or inconsistency between the Commissioner's consolidated return Regulations with respect to the accounting periods of the affiliated group (which provided that the subsidiary would adopt the parent's accounting period, Treasury Regulations 129, Section 24.14(a)) and the Commissioner's regulation with respect to certain insurance companies (that they should use the calendar year accounting period, Treasury Regulations 111, Section 29.204-1). The Commissioner, in his consolidated return Regulations with respect to the accounting period for the affiliated group, had provided that (Treasury Regulations 129, Sec. 24.14(b)):

If a change of accounting period is necessary in order to conform the accounting period of the common parent and of its subsidiary, and if the requirements of Section 29.46-1, Regulations 111 relating to notice of change, cannot otherwise be complied with, such notice shall be furnished at or before the time for filing the consolidated return.

Consequently, in his consolidated return Regulations, the Commissioner had specifically prescribed a method for conforming the accounting periods of subsidiaries to parents and for the notice requirements for such changes of accounting periods. Under this method as set out, Allstate could adopt Sears' fiscal year ending January 31, 1951, and could file a consolidated return for this fiscal year without securing advance permission from the Commissioner. It is essentially the taxpayer's position that this quoted provision had no application to it because of the insurance company regulation referred to above. It is in connection with this problem of conforming accounting periods that the affidavit of Mr. Swartz becomes significant.

## ARGUMENT

### I

#### ASSISTANT COMMISSIONER SWARTZ' AFFIDAVIT SETS FORTH FACTS PROPERLY ADMISSIBLE IN EVIDENCE

The affidavit in question states, on knowledge and belief, that an administrative practice existed, describes the administrative practice, and further states that it was consistently followed since at least 1945. When the affidavit is supplemented by the stipulation filed on November 6, 1961, the manner and occasions upon which the described administrative practice was followed and carried out are made clear. Although the taxpayer's counsel at the argument on October 23, 1961, urged that the affidavit should be stricken because the statements therein were conclusory and interpretative, taxpayer apparently recognizes that this argument is without merit, since it only deigns to cover the matter in a footnote in its brief. (See Br. 19, fn. 5.) It appears clear that the existence of an administrative practice is a fact which can be presented by testimony and that consequently Mr. Swartz' affidavit states evidentiary facts. He stated these facts on knowledge and belief based on his examination of certain files of which he has custody by virtue of his office. However, taxpayer's counsel apparently having relinquished this initial argument, the Government will move on to taxpayer's primary contention for striking the affidavit, that is, that the existence of an unpublished administrative practice, if not promulgated by formal regulation, is irrelevant to the issues in this case.

A. *The taxpayer's lengthy analysis of the publication provisions of the Administrative Procedure Act and the Federal Register Act has nothing to do with the question presented here*

It is apparently taxpayer's argument that no "privilege" to file consolidated returns with Sears could exist



unless this privilege was granted by formally published Regulations, and that unpublished letter rulings to individual taxpayer evidencing the existence of an administrative practice cannot be used by the Government to show that such a "privilege" existed. This argument completely misconceives the purpose for which the Government offers this evidence with respect to an administrative practice.

The Government has no quarrel with the taxpayer's assertion that substantive rulings and Regulations, binding upon, and for the guidance of, the public must be promulgated and formally published in compliance with the rule-making procedure prescribed in Section 4 of the Administrative Procedure Act (Appendix, *infra*) and in the Federal Register Act. (Br. 22.) However, Section 4(a) of the Administrative Procedure Act exempts from the notice, hearing and publication requirements of the Act "interpretative rules", except where notice and hearing is required by statute. Taxpayer has pointed to no such special statute, and the Government does not know of any that is applicable. Rulings issued to individual taxpayers upon their request for information or for the Commissioner's position in respect to a particular transaction rather clearly fall within this "interpretative rules" exception. (See discussion in taxpayer's brief, pages 35-36.) The unpublished letter rulings issued to individual taxpayers are not intended for general guidance and are not binding on the public. They are merely answers to requests for advice dealing with the particular taxpayer in question. To hold, as taxpayer apparently urges, that the Internal Revenue Service need go through the involved hearing, notice and publication procedure prescribed by the Administrative Practice Act and the Federal Register Act every time it gives requested advice to an individual

taxpayer would paralyze the administration of the Internal Revenue laws and in all likelihood deprive taxpayers of the benefit of any such advice. Certainly taxpayer does not mean to argue that every individual ruling issued to a particular taxpayer must be processed through this hearing, notice and publication procedure. It is noted that similar interpretative rulings of the Service dealing with an alcohol labeling problem have been held to be exempt from the notice and hearing procedures of these Acts. See *Gibson Wine Co. v. Snyder*, 194 F. 2d 329 (C.A. D.C.). It is noted that the Regulations issued with respect to publication of Regulations, Treasury Decisions, and Rulings after enactment of the Administrative Procedure Act do not require that every private ruling be published, but only those which "announce a ruling or decision upon a novel question or upon a question in regard to which there exists no previously published ruling or decision, or for other reasons, are of such importance as to be of general interest." (26 C.F.R. (1949 ed), Sec. 601.118.) Similar language is contained in the front page of the Cumulative Bulletins. (Cf. Br. 37-38.) Thus, if the ruling in question is of no general interest or is of limited application, the Commissioner will not publish it.

As pointed out above, the Commissioner, by a formally adopted regulation, has provided that the conforming of accounting periods is a requirement for filing consolidated returns, and the regulation allows such filing if the subsidiary is a member of the affiliated group and can conform its accounting period to the parent. The promulgation of this regulation was pursuant to express authority granted by the statute. The taxpayer has not argued that this regulation is invalid, and this regulation grants the "privilege" in question upon conforming the accounting periods. Thus, the only issue is *how* and *if* this conform-

ing of accounting periods can be accomplished once a taxpayer qualifies as a member of an affiliated group. The Commissioner, in his consolidated return Regulations (Sec. 24.14, Appendix, *infra*) has outlined and established a method, and the problem in this case is only raised by an apparent conflict with another regulation directing an insurance company to file its returns on the calendar year basis, and thus (as taxpayer would have it), inferentially, prohibiting an insurance company's subsidiary from following the consolidated return Regulations method for conforming to its parent's fiscal year period.

In this situation, certain taxpayers requested advice from the Commissioner as to how to resolve this problem and they received advice. The advice they received from the Commissioner is reflected in these letter rulings referred to in the stipulation filed on November 6, 1961. The advice given to a particular taxpayer in the ruling letter of May 26, 1945, was distributed by the national office to the field offices of the Internal Revenue Service for their guidance. Thus, the Commissioner developed an administrative practice for the solving of this problem when taxpayers in this peculiar situation requested his advice as to the method to be used to conform accounting periods.

Is it the taxpayer's position that the Commissioner could not issue these letters of advice to individual taxpayers as to how he interpreted his own Regulations and as to the method he would allow for conforming accounting periods so that consolidated returns could be filed? The Government is not here urging that the Commissioner could bind taxpayers by such private letter rulings to a practice or procedure which was adopted without conformity to the procedures of the Administrative Procedure Act and the Federal Register Act. In other words, if the Commissioner had wished to require a taxpayer in this peculiar posi-

tion to resort to a particular procedure to conform accounting periods, or bind taxpayers to a particular interpretation of the statute, or issue a substantive ruling of general and binding effect, it would appear that he would have to go through the formal procedures required by the statutes. But to say that the Commissioner could not issue interpretative rulings to individual taxpayers, and develop a practice which he would follow through such a case by case handling of particular taxpayers' requests for advice is a denial of the very concept of an administrative procedure and is absurd.

Once we put to one side the taxpayer's argument, which no one here disputes, that an unpublished practice cannot be binding or enforced upon the taxpayer,<sup>8</sup> one sees that all of taxpayer's arguments based on the Administrative Procedure Act and the Federal Register Act are not applicable here. It is the Government's view that this administrative practice is relevant in order to show what the Commissioner would have done in the hypothetical situa-

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<sup>8</sup> It should be noted that the cases cited by the taxpayer all concern attempts by the Government to enforce a rule or regulation. Thus, *Tobin v. Edward S. Wagner Co.*, 187 F. 2d 977 (C.A. 2d), cited and discussed on page 25 of taxpayer's brief, involved a question of coverage under Regulations and was an attempt by the Government to enjoin the defendant under these Regulations. *Woods v. Benson Hotel Corp.*, 75 F. Supp. 743 (Minn.), affirmed, 168 F. 2d 694 (C.A. 8th), cited and discussed on pages 34-35, was also an attempt to enjoin on the basis of non-compliance with certain Regulations. *Hotch v. United States*, 212 F. 2d 280 (C.A. 9th), cited on page 35, was a criminal proceeding against a fisherman who disregarded a Regulation prohibiting fishing in a certain area. None of these cases purport to hold or even discuss a situation involving interpretative rulings without general or binding effect, and are of no aid to the taxpayer here.



tion which would have existed if Allstate had wished to file a consolidated return with its parent, Sears, and has asked the Commissioner for advice as to this problem or permission to go ahead in so filing.

Thus, the evidence with respect to this practice shows how the Commissioner had treated similar situations and further shows that the Commissioner had worked out a resolution of any possible conflict between his regulation with respect to the accounting period of an affiliated group and his regulation with respect to insurance companies filing returns on the calendar year accounting period. As pointed out by taxpayer (Br. 21-23), the Commissioner had broad discretion conferred upon him by Congress in the consolidated return area. Certainly the Commissioner was justified in finding a way in which consolidated returns could be filed, if desired, by insurance companies with non-insurance parents on fiscal years. Although a taxpayer was not bound to adopt or use the method for conforming accounting periods which the Commissioner developed as his administrative practice, and might have urged or requested some other method, the fact is (as the affidavit of Mr. Swartz shows) that the Commissioner had consistently sanctioned a particular method to particular taxpayers seeking his advice, *and that he was permitting the filing of consolidated returns through this method*. Accordingly, to briefly summarize, it is not the Government's purpose in offering Mr. Swartz' affidavit to urge that Allstate was bound by any such administrative practice or required to follow any such method. Rather, it is the Government's purpose to show that the Commissioner had developed a particular practice by which insurance companies could conform their accounting periods to their parent's and thus show that Allstate could have filed consolidated re-

turns with its parent, Sears, if it had wanted to (i.e., using the taxpayer's terminology, it had the "privilege" of filing a consolidated return with Sears).

It should be pointed out again that the total asset test set out in Section 435(e)(1)(A)(i) (Appendix A) (under taxpayer's theory) assumes a hypothetical situation, that is, that the assets of the taxpayer are to be combined with those of the corporations with which it could file consolidated returns *if it wanted to*. The question is not whether Allstate and Sears could be compelled to file a consolidated return or indeed whether they knew what their "privilege" was. If a consolidated return were actually filed, there would obviously be no problem. Of course, Allstate did not want to have so filed and would not have so filed because it would then have lost the argument it now makes for the growth method.

Accordingly, any attempt by taxpayer to argue that this administrative practice is illegal or in violation of the statute and Regulations is, at best, a difficult one in these circumstances. If the taxpayer, Allstate, had wanted to file a consolidated return and if it therefore had wanted to conform its accounting period to that of its parent, it presumably would have been willing to go through the procedure suggested by the Commissioner so that it could conform its accounting period and file a consolidated return with its parent, Sears. Once the accounting periods were conformed, it would, of course, have had the "privilege" of filing consolidated returns. Having wanted to so file and having filed with the Commissioner's advice, is it likely that it would have then argued that the procedure suggested was illegal? But whether it wished to argue about the method for conforming or not, it would have been allowed to file and hence had the "privilege".



## II.

# NO PRONOUNCEMENT BY THE INTERNAL REVENUE SERVICE REFERRED TO BY TAXPAYER MAKES THIS ADMINISTRATIVE PRACTICE IRRELEVANT

Taxpayer urges that certain pronouncements by the Internal Revenue Service in the Federal Register and in its Cumulative Bulletins prohibit the Government from proving the existence of this unpublished practice. It appears that taxpayer's argument is something akin to an estoppel argument. Typically an estoppel argument requires the proof that the other party relied on some representation to its detriment. Allstate has shown no such reliance here and could not, because the total assets test involves (as discussed above) a hypothetical situation. And the Government is not attempting to bind the taxpayer by this practice. The Government is simply pointing out that, if as taxpayer urges, the statutory question in this case is whether taxpayer could in fact have filed a consolidated return, then we know of no better proof than the fact that similarly situated companies who in fact tried to do so were permitted to do so.

A close study of the authorities cited fails to show that the Government is estopped from proving how the Internal Revenue Service handled certain situations by unpublished letter rulings giving advice to taxpayers. Of course, the Revenue Service publishes some rulings in its Cumulative Bulletins, but no published pronouncement of the Service states that all rulings must be published, or that unpublished rulings would have to be disregarded when the Service was confronted with a similar request for advice by a taxpayer. Any argument for such a position invites an inconsistent handling of such requests for advice, which is certainly an undesirable result.

It is true that the Cumulative Bulletins up until 1951<sup>9</sup> contained on the front or introductory page a statement that unpublished rulings or decisions would not be "cited or relied upon" by officers or employees of the Revenue Service as a precedent in the disposition of other cases. A study of the position of the pronouncement in the Federal Register, quoted on page 38 of taxpayer's brief in relation to the section headings, indicates that it may be concerned with a public statement by a Service employee to a taxpayer that "we have ruled or have done so and so" in a named case. Employees of the Internal Revenue Service were and are forbidden by law to disclose actions taken with respect to any particular taxpayer.<sup>10</sup> The Government has not violated this rule in this case. However, even in the face of this pronouncement of questionable applicability to the instant situation, it appears obvious that the Commissioner, being faced with a request for advice from a taxpayer, would and should refer to the advice he had given before in similar situations, whether the ruling that had been issued before was published or unpublished. Certainly the Commissioner should strive for consistent results to all taxpayers in similar circumstances. Not only is this true as a general proposition, but as the stipulation filed on November 6 indicates, the initial letter ruling dated May 26, 1945, was distributed by the national office to the field offices for guidance. The whole purpose of this

<sup>9</sup>Although taxpayer's brief states (p. 38) that every Internal Revenue Bulletin since 1924 contained this statement, it appears that the particular statement referred to appeared in the Cumulative Bulletin for the last time on the front page of the 1951 issue.

<sup>10</sup>1954 Internal Revenue Code, Section 7213(a)(1); 1939 Code, Section 55(f)(1).

procedure was that field offices were to follow a similar practice in handling similar situations. That is, taxpayers in similar positions were to be treated in a similar fashion. This is certainly a reasonable aim for the administration of a revenue statute.

As has been pointed out in Argument I above, the Government is not attempting to bind the taxpayer by the proven administrative practice or force taxpayer to follow any particular procedure. The primary purpose for which the proven administrative practice is offered is to show what would have happened if taxpayer had desired to file a consolidated return and had proceeded to request advice as to the method for doing so. The practice shows that Allstate did have the "privilege" of filing consolidated returns with its parent Sears, because it would have been allowed by the Commissioner to do so.

The taxpayer attempts to argue that Revenue Ruling 55-80, 1955-1 Cum. Bull. 387, is inconsistent with the proven administrative practice. The slightest study of the published Revenue Ruling, as compared with paragraph 3 of Assistant Commissioner Swartz' affidavit, shows that the Ruling deals with another aspect of this situation, namely, a change of the parent's accounting period to conform to the subsidiary.<sup>11</sup> Thus, the Ruling is merely another method of conforming accounting periods of a subsidiary and parent. Is it taxpayer's position that the Commissioner is limited to only one method to handle the mechanics of conforming accounting periods? Such a posi-

<sup>11</sup> The administrative practice in question deals with a change by the subsidiary insurance company to conform to the parent's fiscal year accounting period for the initial year, and then a change back to the calendar year by the affiliated group.

tion is preposterous. Certainly the Commissioner can find more than one way to arrange for the mechanics of conforming accounting periods. Moreover, the published Revenue Ruling does not deal with an insurance-company subsidiary. But even if there was a conflict (which the Government does not see)<sup>12</sup> between the published Ruling and the practice described in Assistant Commissioner Swartz' affidavit, this would be irrelevant here, since the existence of a practice or method allowing the conforming of accounting periods in any manner for Allstate's first taxable year after June 30, 1950, will defeat taxpayer's claim. Consequently, taxpayer's assertion that this published Revenue Ruling is in conflict with the administrative practice described in Mr. Swartz' affidavit, and that therefore evidence of the practice must be excluded, is without merit.

### CONCLUSION

In summary, the Government submits that the proof of an administrative practice, whether published or unpublished, is highly relevant in this case in order to show what the Commissioner would have done if Allstate had wanted to file a consolidated return for the period in question with its parent and if the Commission had been requested for advice or permission with respect to conforming the accounting periods of Allstate and Sears. If taxpayer's argument that the statutory test under Section 435(e)(1)(A)(i) is whether Allstate had the "privilege" of ac-

<sup>12</sup> Note that the Commissioner saw no conflict, since he issued a letter ruling (dated January 18, 1956) carrying out his practice after publication of Rev. Rul. 55-80, and issued his regulation in 1959 embodying the practice (Treasury Regulations on Income Taxes (1954 Code), Section 1.1502-14(c)) without revoking this published ruling.



tually filing a consolidated return with Sears prevails, then the Government believes that the administrative practice described in Mr. Swartz' affidavit helps to show that Allstate could have filed if it had so desired because the Commissioner would have allowed the conforming of accounting periods in accordance with Service practice. Consequently, this evidence helps to show that the taxpayer actually did have the "privilege" of so filing. For these reasons, taxpayer's motion to strike Mr. Swartz' affidavit should be denied.

Respectfully submitted,

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## APPENDIX

### Internal Revenue Code of 1939:

SEC. 435. [as added by Sec. 101, Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137, and amended by Sec. 504(a), Revenue Act of 1951, c. 521, 65 Stat. 452].  
EXCESS PROFITS CREDIT—BASED ON INCOME.

• • •

(e) *Average Base Period Net Income—Alternative Based on Growth.*—

(1) *Taxpayers to which subsection applies.*—A taxpayer shall be entitled to the benefits of this subsection if the taxpayer commenced business before the end of its base period, and if either—

(A)(i) the total assets of the taxpayer as of the first day of its base period (when added to the total assets for such day of all corporations with which the taxpayer has the privilege under section 141 of filing a consolidated return for its first taxable year under this subchapter), determined under paragraph (3), did not exceed \$20,000,000, and

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(26 U.S.C. 1952 ed., Sec. 435.)  
Treasury Regulations 129 (1939 Code):

Sec. 24.14. *Accounting period of an affiliated group.* (a) The taxable year of an affiliated group which makes a consolidated return shall be the same as the taxable year of the common parent corporation; and, upon having elected to file consolidated returns, each subsidiary corporation shall, not later than the close of the first consolidated taxable year ending thereafter, adopt an annual accounting period, fiscal year or calendar year as the case may be, in conformity with that of the common parent.



(b) If a change of accounting period is necessary in order to conform the accounting periods of the common parent and of its subsidiaries, and if the requirements of section 29.46-1, Regulations 111, relating to notice of change, cannot otherwise be complied with, such notice shall be furnished at or before the time of filing the consolidated return.

• • •

Administrative Procedure Act, c. 324, 60 Stat. 237:

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) *Notice.*—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issue) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.*—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in

any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

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(5 U.S.C. 1958 ed., Sec. 1003.)

### DEPOSITION OF HAROLD T. SWARTZ NOTICE OF CORRECTION

This is to certify that Mr. Harold T. Swartz, deponent in the above-entitled matter, upon appearance before Jo Ann Withers, Notary Public who duly swore Mr. Swartz at the time of taking of said deposition, for the purpose of reading and signing said deposition, requested the following changes be made:

Page 13, line 10, change "it" to —I—.

Page 34, line 22, change last word "affiliation" to —affiliated group—.

Page 44, line 24, delete first "that" to make line read—  
A The reason is that the specialists keep copies—.

Page 49, line 23, change "The" to —They—.

Page 54, line 25, change "done" to —did—.

Page 67, line 6, change "and" to —in—.

Page 67, line 6, change "conferences" to —Corporation  
Section—.

Page 70, line 11, change "on" to —only—.

Page 90, line 23, after "office" insert —to be used—.

Page 95, line 1, delete the word "several".

Page 108, line 11, change "file" to —files—.

Page 111, line 4, change "To" to —Do—.

Page 120, line 19, change "modifies it." to —is modified—.

Page 120, line 24, change the “,” to —;—.

Page 131, line 18, after the word “say” insert—, “—,

Page 131, line 18, at end of line after “,” add—”—.

Page 132, line 6, change “we” to —he—.

Page 132, line 7, at beginning of line before the word “see” insert —“—.

Page 132, line 7, after “5/26/45,” insert —”—.

Page 132, line 8, before the word “another” insert —“—.

Page 132, line 8, after “file,” insert —”—.

Page 133, line 22, change “in” to —and—.

Page 138, line 4, insert after the word “what” the word —was—.

Page 147, line 9, change the word “time” to —file—.

Page 147, line 20, change “Mr. Cleos” to— Mr. Klioze—.

Page 148, line 6, insert after the word “prepared” the word —return—.

Page 157, line 6, change Section citation to read —Section 1.1502-14(a)—.

Page 158, line 5, delete “or”.

Page 158, line 5, after the word “Office” insert —, that is,—.

Page 159, line 8, change Section citation to read —Section 1.1502-14(a)—.

Page 168, line 8, change “a wary” to —where a—.

Page 169, line 16, change “request” to —requested—.

Page 175, line 25, change “answer” to —answered—.

Page 177, line 17, before the word “acquired” insert —an—.

Page 179, line 16, after the word “one” insert —time—.

Page 179, line 16, change “no” to —now—.

Page 179, last line, change “letter” to —letters—.

Page 186, line 1, insert after “probably” —be—.

Page 189, line 21, change “further on the card” to —further, on the card,—.

Page 193, line 18, after “to” insert —the—.

Thereafter deponent signed the original copy of the deposition.

This is to further certify:

That a copy of this correction notice has this day been mailed to all counsel entering appearances at the time of taking of this deposition.

That the original signed copy of this deposition, together with all exhibits and the original copy of this correction notice, has this day been filed with the Clerk of the Court by placing same in the U.S. mail.

Dated: December 29, 1961

/s/ Jo Ann Withers

Notary Public in and for the  
District of Columbia

My Commission Expires February 14, 1965.

### DEPOSITION

Washington, D. C.

Tuesday, December 19, 1961

Deposition of Harold T. Swartz, a witness, called for examination by counsel for Defendant by stipulation and agreement by and between counsel, in the Office of the Assistant Commissioner, Technical, Internal Revenue Service, Room 3018, Internal Revenue Building, Washington, D.C., beginning at 10:00 o'clock a.m., before Jo Ann Withers, a Notary Public in and for the District of Columbia, when there were present on behalf of the respective parties.

#### For the Plaintiff:

Charles W. Davis, Esq.,

William McClintock, Esq., and

Edward W. Rothe, Esq., Attorneys of the Law Firm  
of Hopkins, Sutter, Owen, Mulroy & Wentz, One  
North LaSalle Street, Chicago 2, Illinois.

#### For the Defendant:

R. Michael Duncan, Esq., and

David Wilson, Esq., Attorneys for the Tax Division,  
United States Department of Justice.



## PROCEEDINGS

Mr. Duncan: Let the record show that this deposition is taken by stipulation of the parties and is governed by the federal rules of civil procedure and Mr. Swartz appears without notice or subpoena.

Whereupon

HAROLD T. SWARTZ was called as a witness and duly sworn by the Notary.

(Pause.)

Mr. Duncan: We understood that this was your discovery deposition in line with the Judge's remarks at the hearing on Monday. Referring to page 10 of the transcript, Mr. Maloney speaking to the Court:

"May I ask you, in your last sentence I think you said the plaintiff may seek by deposition to show what it intends to show. Were you referring to the plaintiff, Allstate, the taxpayer?"

"The Court: Yes. I understand that you are in the process of taking the deposition of Commissioner Swartz. Then, if that is true, why, you may want to pursue that and see if you can establish by your deposition what you have not been able to establish by your affidavit. If you can, then you may try to renew your motion for a summary judgment." Then the Court goes on.

"Mr. Davis: The record may show, Your Honor, that the plaintiff did agree to the procedure for deposition. It was plaintiff's understanding that the burden of going forward here with respect to the asserted practice was upon the defendant and therefore that it was defendant who was conducting the deposition with such opportunity for cross-examination."

"The Court: Whenever affirmative defenses are asserted, plaintiff seeks to discover by deposition what they

are and tries to defeat them by deposition, so your motion for summary judgment would lie anyway."

I may be wrong, but I interpreted this to mean that you were going ahead with the discovery deposition of Mr. Swartz.

Mr. Davis: As we tried to make clear to you by letter and by telephone conversation, we thought the Court certainly made it clear when the Judge said at page 10:

"I am saying that the burden is upon the government to go forward."

We understood the order of the Judge, here, the decision of Judge Parsons to be that the affidavit would be stricken. If that is the effect of his order, then there is presently no evidence with respect to an asserted and published administrative practice in the record of this proceeding.

Mr. Duncan: But there is a hearing for this matter set for January 5th, is there not?

Mr. Davis: There is a hearing, yes.

Mr. Duncan: As I understood the matter could be tried out at that time.

Mr. Davis: I believe that the Judge expressed the desire, if the parties might by deposition obviate the necessity for a hearing on January 5, or that he would perhaps set this very issue for trial.

Mr. Duncan: Reading from page 12 of the transcript:

"Report on January 5th and to set for trial as to this one issue on that day."

Mr. Davis: Yes, right. Is that beyond what I said?

Mr. Duncan: I thought this was to be tried on January 5th.

Mr. Davis: And to set for trial as to this one issue on that date. I understood that he wanted a report on January 5 as to what happened in the interim, and then he would set for trial as to this particular issue on that day.



Mr. Duncan: We seem to have reached a difference in understanding. However, I don't think it is a severe one.

Do you decline to go ahead with the discovery deposition of Mr. Swartz at this time?

Mr. Davis: At this point we have nothing to discover of which I have notice.

Mr. Duncan: In other words, you assume that we would now go forward and prove administrative practice at a trial? You will recall that I made available to you all of the rulings.

Mr. Davis: You have made available certain ruling letters and if, as and when those ruling letters appear to be a part of or are about to become a part, when we have been notified that they are about to become a part of the record in this proceeding, then we would take such action as we consider appropriate to develop their relevance, competence, authenticity.

Mr. Duncan: Did you really feel that we would not go forward to prove with those ruling letters at the trial? We understood the trial was for January 5th on this issue, but you understand that the Court is to set the day on that day for the trial on that issue.

Mr. Davis: I just invite your reading of the first item on page 12 of the transcript:

"Report on January 5th and to set for trial as to this one issue on that day."

Mr. Duncan: Yes, that's what he said. I thought he said set for trial on that day. But we are quibbling over what the judge meant and we evidently misunderstood him.

Mr. Davis: Your description of "quibbling," I don't mean to be quibbling. I tried to follow the judge's remarks in open court and then found them confirmed in the transcript.

Mr. Duncan: I think, Mr. Davis, rather than make your trip from Chicago worthless and in order to avoid delay in

the proceedings, we will assume the burden and go forward here. This is not what we understood you were coming here for. Perhaps it is our fault for misunderstanding you.

Mr. Davis: Would you like us to offer for the record the correspondence in which I believe that our understanding was set forth on all fours in conformity with what the judge has directed? We construed what the judge said on November 20th to be precisely what the judge held here, and so notified you by correspondence. Then we had a telephone conversation about it in which you indicated disagreement. I had no knowledge of what the judge was going to say when we appeared to express our willingness to agree to the government's motion for a continuance on December 11, and at that point the judge made it so crystal clear that, as he viewed it, the affidavit was inadmissible and that the burden was on the government to establish the existence of administrative practice by whatever competent evidence was available to it.

Consequently we have tried, we think, to maintain a uniform position with respect to this matter, since it first arose.

Mr. Duncan: We evidently have a misunderstanding. I don't suppose there would be much point in arguing about it now. We might as well go ahead on the record then with the examination of Mr. Swartz.

If we do go ahead and take the deposition of Mr. Swartz, are you agreeable that this be introduced at the trial as his testimony, in effect, without requiring him to go on to Chicago?

Mr. Davis: That would depend upon whether the testimony offered is complete with respect to the matters covered and whether, as we would of course during the course of our deposition, or of our interrogation and of your examination, raise objection to the form of any question propounded.

Mr. Duncan: Of course, assuming that, I mean. But, aside from that fact, will you insist on, assuming the completeness of this examination, will you be agreeable to this constituting Mr. Swartz' examination? I would like to add that, of course, to the extent that it is not complete, you would have your chance for cross-examination.

Mr. Davis: Yes, the only thing is whether—as I have no present intention to require Mr. Swartz to come to Chicago, that is furthest from my mind—if we should find that on the basis of the record and the manner in which this testimony develops that we sitting here do not comprehend the full significance of some of the testimony or that we feel that there may be something to which his testimony, further testimony, might contribute toward the cause of the case, then we would not wish to be estopped from that.

We have prepared ourselves for this deposition, but I have no way of reading in advance just precisely what you may wish to develop. Mr. Swartz was not qualified in your affidavit, particularly in your affidavit, as an expert witness in the field that we have.

If we get into intricate concepts of consolidated returns and consolidated return accounting, I just do not wish to foreclose myself at this time from a possibility of having to call Mr. Swartz for the hearing, but I certainly do not anticipate that that would be necessary.

Mr. Duncan: I believe the federal rules will govern whether his deposition is admissible in evidence in Chicago.

Mr. Davis: Right.

Mr. Duncan: You will have full opportunity to cross examine.

Mr. Swartz, we may as well proceed.

Whereupon

HAROLD T. SWARTZ was called as a witness by counsel for the defendant and, having previously been sworn by the Notary, was examined and testified as follows:

*Examination on Behalf of the Defendant by Mr. Duncan.*

Q. Please state your name.

A. Harold T. Swartz S-w-a-r-t-z.

Q. What is your present residence, Mr. Swartz?

A. My present residence is 1555 Mount Eagle Place, Alexandria, Virginia.

Q. What is your present occupation?

A. My occupation is Assistant Commissioner, Internal Revenue, in Charge of Technical Functions.

Q. How long have you been employed by Internal Revenue, sir?

A. A little over 26 years.

Q. Would you give us a description of the jobs you have held and approximately when you have held them with the Internal Revenue Service?

A. Yes. I started with the Internal Revenue Service in 1935 as an Internal Revenue Agent.

Q. Where were you stationed?

A. New York City.

Auditing various returns: corporations, individuals, trusts, partnerships. I think in 1939 I became a conferee in the New York Office.

The functions of a conferee are to hear protests and decide issues where taxpayers are protesting the results of a revenue agent's preliminary findings, audit.

In 1943, I came to Washington to become the Chief Conferee of the Pension Trust Division of the Internal Revenue Service. At that time this was a temporary assignment. I was here for a year and a half on that assignment.

I went back to New York and for a short period handled Section 722 relief cases and later on in 1945 I was transferred



ferred to Washington as the Technical Advisor to the Deputy Commissioner of the Income Tax Unit.

In 1947—

Q. Could you break this just a second and tell us what the Income Tax Unit was in 1947?

A. In 1947, the Income Tax Unit was in full charge of all income tax matters relating to internal revenue taxation.

The Deputy Commissioner not only had charge of all the audit functions in the field, with respect to auditing income tax returns, but also was in charge of the post review function in Washington, was in charge of the rulings function in Washington. In other words, the Deputy Commissioner of the Income Tax Unit was in charge of all aspects of income taxes.

Q. How long were you there?

A. I was there two years.

In 1947, I was made a member of the Commissioner's Management Staff. My assignment to the Commissioner's Management Staff was primarily in connection with representing the Commissioner in legislative and regulation matters which concerned the Commissioner, the Treasury Department and I assisted the Ways and Means Committee and the House Legislative Counsel in connection with—in an advisory capacity—in connection with legislation and regulations.

In 1951, I was appointed Assistant Deputy Commissioner of the Income Tax Unit. I served in that capacity for a little over a year at which time the Internal Revenue Service was reorganized. The reorganization was based on a functional setup; instead of deputy commissioners being in charge of the entire function with respect to a particular tax, the national office of the Internal Revenue Service was divided into functions. In other words, all of the ruling functions, regulation functions of all the taxes, includ-

ing excise, employment taxes, estate taxes, gift taxes and income taxes were separated and put into the Technical Organization.

The other functions of the Internal Revenue Service were also divided into separate functions: the audit responsibilities, the appellate responsibilities, the collection responsibilities were put in under another function. In other words, I then became the Director of the Tax Rulings Division. This was in 1952, and the Director of the Tax Rulings Division was in charge of all rulings issued to taxpayers, it was in charge of answering all requests for technical advice from field officers, it was in charge of—well, those were the two primary functions at that time of the Tax Rulings Division.

Q. How long were you Director of the Tax Rulings Division?

A. I was Director of the Tax Rulings Division from 1952 until 1958.

In 1958, I assumed my present capacity as Assistant Commissioner, Technical.

Q. What function does the Assistant Commissioner, Technical, have?

A. The Assistant Commissioner, Technical, has charge of the Rulings Division; it has charge of the Technical Planning Division, which is the Commissioner's functions in connection with legislation and regulations, and also preparing the tax forms; it has charge of the Special Technical Services Division which are our engineers and preparing and putting out the Internal Revenue Bulletin; also in charge of the Tax Treaty Arrangements, the Commissioner's functions in connection with arranging tax treaties with foreign countries.

Q. How long would you say you have been associated with the ruling processes?



A. At least since 1951 when I became Assistant Deputy Commissioner of the Income Tax Unit.

Q. That is directly associated with rulings?

A. Directly associated. I would like to add that when I speak of the various taxes that this does not include alcohol and tobacco taxes; alcohol and tobacco taxes are under a separate function.

Q. But you have been directly associated with income tax rulings since 1951?

A. Since 1951.

Q. By virtue of your job, do you have by virtue of being Assistant Commissioner, Technical, general charge of the ruling situation?

A. Yes, I have charge of the Tax Rulings Division, which handles practically all the rulings, other than alcohol and tobacco tax. I have charge also of the Special-Technical Services Division, which is located in the Engineers. The Engineers also issue some rulings. So that, with respect to all rulings, other than alcohol and tobacco tax, I now have full charge.

Q. What records are kept of rulings that have been issued in your office?

A. In the Technical Organization as a whole, a copy of every ruling to a taxpayer, a copy of every memorandum of technical advice to our field offices are filed under subjects.

Q. This is the present system?

A. This is the present system.

There are precedents, certain precedents that are designated as, maybe, the first time we have issued a ruling which are placed in what we call our "Precedent File".

Q. These are routine in the ordinary course of your business?

A. Yes, they are.

Q. Of the office's business, I mean.

A. Right.

Q. In these records, the records of the rulings that are kept are the actual carbon copies of the rulings; is that right?

A. Right.

Q. In the Precedent File, do you retain copies of the taxpayer's requests for those rulings?

A. Yes, in the Precedent File, the entire file is maintained; in the Precedent File there are requests for rulings, exhibits, carbon copies of the rulings.

Q. Could you tell us, Mr. Swartz, how many requests for rulings the office has been receiving over the years?

A. It varies. Requests for rulings would include, we include in our figures the requests for technical advice from field officers, requests for rulings from taxpayers, requests for changes in accounting period, requests for changes in accounting method. The volume runs between 30 and 40 thousand a year.

Q. Has this been true over the last 10 years?

A. Yes.

Q. Could you tell us a little bit about a ruling process? What is the process? How is a ruling issued? What causes it to be issued?

A. Ordinarily, with respect to rulings to taxpayers, the large bulk of our rulings to taxpayers are in connection with a contemplated transaction rather than a consummated transaction. It's a transaction that a taxpayer wishes to enter into and he usually writes to our office setting forth the facts, all parts of the transaction which he contemplates entering into and asking us specific questions, generally, as to what would be the tax result if this transaction is consummated.

In connection with changes of accounting periods, they usually designate the period that they are reporting on, setting forth the period that they would like it changed to,

the reasons that they would like to change and asking for permission to change. It is the same with accounting methods. They may be under an accounting method and wish to change to another method and ask the Commissioner's permission to change to that method.

Q. What is the function of a ruling, what does it mean?

A. The function of a ruling is to advise the taxpayer with respect to the tax result that he can expect, and the treatment that he can expect from the Internal Revenue Service if he consummates the transaction in accordance with the presentation he has made to us.

Q. The ruling letter itself, what does it set out?

A. The ruling letter itself usually repeats the pertinent facts that the taxpayer has presented, describing the transaction that he wishes to enter into, and it contains some reasoning, usually, as to how we arrive at the answer and answers the request. It addresses itself to the inquiry.

Q. When a ruling has been issued, what effect does this have on the lower offices of the Revenue Service, or on the transaction once it has been completed?

A. To the taxpayer?

Q. Yes, to the taxpayer.

A. A ruling to the taxpayer can be relied on by that taxpayer, provided he completes the transaction in accordance with the facts that are set forth.

Q. What do you mean by "the facts that are set forth"?

A. The facts that were described by the taxpayer in his request for a ruling or his letter.

If the transaction is consummated in accordance—in other words, if he proceeds to consummate that transaction in accordance with the facts he has set forth, then this ruling letter is guidance to him as to the treatment that he will receive from this Service and its Revenue Agents.

I might add that this position is set forth now in a published ruling, I believe, number 54-172, in which we point out that if a taxpayer receives a ruling he may rely on that ruling provided the transaction is consummated in accordance with his request, but, however, a Closing Agreement is the only legal means which is binding on both the Commissioner and the taxpayer.

If the transaction is consummated in accordance with the request, ordinarily, even if the Commissioner changes his mind, he will not apply this change retroactively to the taxpayer receiving the ruling.

I might say that in connection with that some of the rulings, for example, change of the accounting period and change of accounting method, constitute in effect a contract. In other words, once permission is granted and a taxpayer changes his methods that is in effect a contract.

Certain rulings, such as rulings that are called for in the law, such as under Section 367, are also binding.

Mr. Davis: I move to strike his answer as being a conclusion, as to Mr. Swartz' statement that this constitutes a contract between the taxpayer and the Internal Revenue Service.

Mr. Duncan: Just to clarify that testimony:  
By Mr. Duncan:

Q. You were referring to certain kinds of rulings?

A. I was referring to rulings which are required. In other words, many of these rulings which are requested by taxpayers are not required under the law, under the regulations; however, in certain instances, the law, the regulations do require the taxpayer to get a ruling or permission from the Commissioner.

In respect to a change in accounting period and in respect to a change of accounting methods, I believe there are some automatic provisions under which the taxpayer can change without permission. When they must receive permission,



to that extent, in my opinion, they have a greater degree of formality than just the ordinary ruling.

Mr. Duncan: I would like to have this document marked as Defendant's Exhibit 1 for identification.

(The document above referred to was marked Defendant's Exhibit No. 1 for identification)

By Mr. Duncan:

Q. Mr. Swartz, could you tell us what that document is?

A. (Examining document) This document is a ruling letter to a taxpayer.

Do you want a full description?

Q. It is a ruling letter to a taxpayer?

A. This is a ruling letter to a taxpayer.

Q. What date is that ruling letter issued?

A. Dated February 14, 1944.

Q. In fact, it is a copy of a ruling letter sent to a taxpayer?

A. Yes.

Q. The names of the taxpayers and other identifying addresses or names have been excised, have they not?

A. Yes, they have.

Q. Was this document found in the ruling files?

A. The copy, copy of this document was found in the ruling files, yes, sir.

Q. Was such a ruling actually issued to a taxpayer?

A. If this copy was in the ruling file, it represents a copy of a ruling that was issued to a taxpayer.

Q. What file was that ruling found in? Was that document found in your Precedent File?

A. I don't believe this particular ruling was found there; I'm not sure whether this was in the Precedent File or not. I don't believe that this was in the Precedent File. May I look at the file?

Mr. Davis: Let the record show what he is looking at.

Mr. Duncan: Let the record show that he is looking at the ruling file from which a copy was made.

By Mr. Duncan:

Q. Is that correct?

A. Yes, this ruling letter is in one of the Precedent Files. It was in a file of this type. It is in the Precedent File.

This ruling dated February 14, 1945 was found in the Precedent File.

Q. Nineteen?

A. '44.

Mr. Davis: May we have described how rulings in the Precedent File are distinguished from rulings which are not found in the Precedent Files?

Mr. Duncan: I was going to ask him that.

By Mr. Duncan:

Q. Could you tell us—I think you described earlier what the Precedent File was, but would you describe what the file is?

A. Yes. Of course, we issue many rulings during the course of a year and when a ruling is issued which in the opinion of the classifiers establishes a precedent, a copy of this is made with the file and placed in what we call our Precedent File. Subsequent rulings which are based on this particular ruling are not necessarily put in the Precedent File; those are placed in the general files under an index system.

Mr. Duncan: I would like to have this document marked as Defendant's Exhibit 2.

(The document above referred to was marked Defendant's Exhibit No. 2 for identification.)

By Mr. Duncan:

Q. Could you identify that document, Defendant's Exhibit 2?

A. (Examining document) It is a copy of a ruling letter dated May 26, 1945 issued to a taxpayer.



Q. With the name of the taxpayer and any identifying marks in the ruling removed; is that right?

A. That's correct.

Q. Referring to the second page of that, Defendant's Exhibit 2, you will note a lot of initials at the bottom of that page. What do those initials mean?

A. Those are initials of the people who have initiated, considered and reviewed this particular ruling letter.

Q. This ruling was issued over the Commissioner's signature, or rather over the Acting Commissioner's signature?

A. Yes, the Acting Commissioner signed this letter.

Q. Was this document found in the Precedent File?

A. Yes, it was. It was also found in our Precedent File.

Mr. Duncan: I would like to have this marked as Defendant's Exhibit 2-A for identification.

(The document above referred to was marked Defendant's Exhibit No. 2-A for identification.)

By Mr. Duncan:

Q. Could you identify this document and tell us what it is a copy of?

A. (Examining document) This is a copy of a request for a ruling, it is dated April 17, 1945, it is addressed to the Deputy Commissioner of Internal Revenue and is a request for a ruling from a taxpayer, or from a taxpayer's representative.

Q. Could you refer to your files and tell us whether this is a copy of the request for ruling represented by Defendant's Exhibit 2, the ruling if which is represented by Defendant's Exhibit 2?

A. Yes. This is, this Exhibit 2-A is the request for the ruling on which the Exhibit 2 ruling letter was based.

Q. I believe you testified that this ruling and request for ruling were found in your Precedent File?

A. That is correct.

Mr. Duncan: I would like to have marked as Defendant's Exhibit 3 for identification this document.

(The document above referred to was marked Defendant's Exhibit No. 3 for identification.)

By Mr. Duncan:

Q. Could you identify Defendant's Exhibit 3 for identification?

A. (Examining document) This is a ruling letter dated September 12, 1945 and was issued on that date to a taxpayer in answer to a request for a ruling.

Q. All right. Was this ruling found in the files of this office?

A. This ruling was found in the files of this office, yes.

Q. But not in the Precedent File?

A. Not in the Precedent File.

Mr. Davis: Excuse me. Did you say December 12?

The Witness: September 12.

Mr. Duncan: May we go off the record a moment.

(Discussion off the record.)

Mr. Duncan: Back on the record.

Mr. Davis: This is not in the Precedent File, is that correct?

Mr. Duncan: His testimony was it is not in the Precedent File.

I would like to have this marked as Defendant's Exhibit 4 for identification.

(The document above referred to was marked Defendant's Exhibit No. 4 for identification.)

By Mr. Duncan:

Q. Could you identify Defendant's Exhibit 4 for identification?

A. (Examining document) Exhibit 4 is a copy of a ruling letter issued to a taxpayer under date of February 5, 1947.

Q. Referring to the second page of that exhibit, was that ruling issued over the signature of the Commissioner?

A. Yes. This was issued over the signature of the Commissioner of Internal Revenue.

Q. Mr. Nunan, according to the stamped signature, was the Commissioner at the time?

A. That is correct.

Q. What are the initials at the bottom of the page 2 of Defendant's Exhibit 4 for identification? What do they signify?

A. Those initials are the initials of the initiator and the reviewers and the signer of this particular ruling letter.

Q. This ruling represented by Defendant's Exhibit 4 was actually issued?

A. This was actually issued, yes.

Q. Was this ruling found in your Precedent File?

A. Yes, this was found in our Precedent File.

Mr. Duncan: I would like to have these documents marked as: Defendant's 4-A for identification;

(The document above referred to was marked Defendant's Exhibit No. 4-A for identification.)

4-B for identification;

(The document above referred to was marked Defendant's Exhibit No. 4-B for identification.)

and 4-C for identification.

(The document above referred to was marked Defendant's Exhibit No. 4-C for identification.)

By Mr. Duncan:

Q. Would you refer to Defendant's Exhibit 4-A, B, and C and tell us what those documents represent in order, and you may wish to refer to the actual file, the Precedent File.

A. (Examining documents) Exhibit 4-A is a request for a ruling to the Commissioner of Internal Revenue, and the request is dated September 25, 1946.

Q. Is that the request which culminated in the ruling represented by Defendant's Exhibit 4?

A. No.

Q. Would you refer to the file, perhaps?

A. Let me see. 4, dated September 25th. No. 4 is 1947. Exhibit 4-A is a request for a ruling dated September 25, 1946.

Q. That is the request, that is the date of the request.

A. That's the date of the request, and that request was answered in a ruling letter marked Exhibit 4-B dated October 10, 1946.

Q. I see. Would you refer to 4-C and tell us what that was?

A. Exhibit 4-C is a request by the taxpayer for a reconsideration of their letter of September 25, 1946.

Q. A reconsideration of our ruling letter dated October 10, 1946, Exhibit 4-B?

A. Yes.

Q. What was the result of that reconsideration?

A. The result of that reconsideration was we issued a ruling to the taxpayer on February 5, 1947.

Q. And that is?

A. Which is Exhibit 4.

Q. I believe you testified this file was in the Precedent File?

A. This file—

Q. This correspondence and this ruling, Defendant's Exhibit 4, was in your Precedent File?

A. Correct.

Mr. Duncan: Would you have that marked Defendant's Exhibit 5 for identification.

(The document above referred to was marked Defendant's Exhibit No. 5 for identification.)

By Mr. Duncan:

Q. Could you identify that exhibit, Defendant's Exhibit 5?

A. Exhibit 5 is a ruling letter to a taxpayer issued under date of August 21st, 1951.

Q. Was that ruling actually issued to a taxpayer?

A. This ruling was issued to a taxpayer.

Mr. Duncan: Would you have that marked Exhibit 5-A?

(The document above referred to was marked Defendant's Exhibit No. 5-A for identification.)

And 5-B.

(The document above referred to was marked Defendant's Exhibit No. 5-B for identification.)

By Mr. Duncan:

Q. Now, would you refer to Defendant's Exhibits 5-A and 5-B and tell us what they are?

Mr. Davis: First, may the record show that plaintiff objects to any line of questioning relating to letter rulings or other documents bearing a date after December 31, 1950.

Mr. Duncan: All right. I think we will take an answer. Under the proceedings here, Mr. Davis, your objections are subject to argument to the Court, but we feel they are relevant and particularly we feel this ruling is very relevant.

By Mr. Duncan:

Q. Would you refer to Defendant's Exhibit 5-A and 5-B and tell us what they represent?

A. (Examining documents) Exhibits 5-A and 5-B—

Q. Let the record show the witness is referring to his file.

A. They represent requests for rulings.

Q. Are those the copies of the requests for rulings or correspondence with respect to a request for rulings?

Leading up to the ruling of October 21, 1951, Defendant's Exhibit No. 5?

A. August 21, 1951.

Q. Yes, you're right.

A. These are the requests for rulings that were considered in connection with the ruling that we issued on August 21, 1951.

Q. Was this document found in your Precedent File?

A. No, this was found in our general file. It was not in the Precedent File.

Mr. Duncan: Would you mark that Defendant's Exhibit 6.

(The document above referred to was marked Defendant's Exhibit No. 6 for identification.)

Would you mark that, while you are at it, Defendant's Exhibit 6-A for identification.

(The document above referred to was marked Defendant's Exhibit No. 6-A for identification.)

By Mr. Duncan:

Q. Would you refer to Defendant's Exhibit 6 and identify that document, if you can?

A. (Examining document) This is a ruling letter issued to a taxpayer under date of May 22, 1953.

Q. And this ruling was actually issued?

A. It was actually issued.

Q. It was found in the files of this office?

A. Correct.

Q. Your office, I mean.

A. Right.

Q. Could you refer to Defendant's Exhibit 6-A for identification and see if you can identify that document?

A. Exhibit 6-A is a request for a ruling addressed to the Commissioner of Internal Revenue under date of May 4, 1953 and is the request on which a ruling of May 22, 1953—

Q. That's Defendant's Exhibit 6.

A. —Exhibit 6 is based.



Q. Was this ruling found in your Precedent Files?

A. No, this was not found in the Precedent File. Again, this was in our general file.

Mr. Duncan: Would you mark that Defendant's Exhibit 7 for identification.

(The document above referred to was marked Defendant's Exhibit No. 7 for identification.)

And 7-A for identification.

(The document above referred to was marked Defendant's Exhibit No. 7-A for identification.)

By Mr. Duncan:

Q. Would you refer to Defendant's Exhibit 7 and identify that document, if you can?

A. (Examining document) Exhibit 7 is a letter ruling issued to a taxpayer under date of January 18, 1956.

Q. When you say it is letter, you mean it is a copy of a letter?

A. It's a copy of a letter.

Q. In fact, all of these documents are copies of the applicable documents?

A. Right.

Q. Was this ruling actually issued?

A. This was actually issued.

Q. Was it found in the files of your office?

A. It was found in the files of our office, yes, sir.

Q. Was this in your Precedent File?

A. No, this was not in our Precedent File; it was in our general file.

Q. Could you refer to Defendant's Exhibit 7-A for identification and identify that document?

A. (Examining document) This is a copy of a request for a ruling from a taxpayer to the Commissioner.

It is dated December 28, 1955, and is the request to which a ruling of January 18, 1956 was issued, which is Exhibit 7.

Q. I believe you testified that was in your Precedent File, or was not?

A. This, yes, this was in our Precedent File.

Mr. Rothe: What was?

The Witness: Defendant's Exhibit 7.

By Mr. Duncan:

Q. Defendant's Exhibit 7—

A. Was in our Precedent File.

Q. Could you tell us what this Precedent File was and how it was used in this office?

A. The Precedent File was the file in which various designated rulings were placed and was used and referred to by our rulings people in searching out what answers to particular questions we had issued in the past.

Q. Before a ruling was issued, was the preparer supposed to check the Precedent File?

A. Yes.

Q. Could he issue a ruling contrary to the Precedent File?

A. If the request that he had before him was identical or similar, if the question that was asked us in the problem that he had before him was in the nature of a request and the answer given in the Precedent File it was to be used, yes, so long as the law hadn't changed and the regulations hadn't changed.

Q. Could you identify in your own words the area in which these rulings were issued, what these rulings deal with?

A. These rulings deal primarily with—

Mr. Davis: I object. Let the record show an objection unless Mr. Swartz is qualified as the person having knowl-

edge of the substance of these requests for rulings and the actual issuance of these rulings.

Mr. Duncan: I think we'll take a couple of minutes break, Mr. Davis, if we could; it's eleven fifteen.

(Recess.)

By Mr. Duncan:

Q. Mr. Swartz, could you tell us how these rulings came to your attention?

A. Copies of these rulings?

Q. Yes.

A. They were brought to my attention by Mr. Levine in connection with an affidavit that—

Q. Was your office requested to search out these rulings by the Department of Justice for the defense of this case?

A. That's correct. We were asked to search out all the rulings we had in this particular area.

Q. Have you read those rulings?

A. Yes, I have.

Q. What is the area involved here with which these rulings deal?

A. The area involved here primarily is in connection with the filing of consolidated returns by an affiliation where one of the affiliates is an insurance company.

Q. How were these particular rulings located?

A. These rulings were located by an index system.

Our general files are indexed in broad categories; our Precedent Files are indexed by name of case and by precedent. They were searched out by looking through the files on the index of consolidations and in addition the technical experts in the Corporation Branch, which, prior to the reorganization was the Coordinating and Advisory Group.

Each specialist usually keeps copies of the rulings that they have considered and issued. Those files were also

thoroughly searched to see whether or not there were any copies of rulings in those files that couldn't be located under the general categories of the index in the Precedent Files or in our general files.

Mr. Rothe: May I have the answer to that played back.

(The answer was read back by the reporter.)

By Mr. Duncan:

Q. Mr. Swartz, having heard your answer read back, is there any amplification or any addition you would like to make?

A. I don't know whether it is an addition or not, but what I attempted to say was that in addition to going through our general files and our Precedent files, we also had our specialists who work on this particular subject go through their own files to search out letters in this particular category.

Mr. Davis: I move that all of this testimony be stricken unless there is identified to whom Mr. Swartz gave instructions and in what form, and then what the report of compliance was with respect to the search that was made.

By Mr. Duncan:

Q. Would you state who you gave instructions to to search these?

A. Upon the request of the Department of Justice.

Q. How—

Mr. Davis: Again, I object to further testimony about the request from the Department of Justice without an indication of when and how it was made and in what form.

By Mr. Duncan:

Q. What did we request you to do, Mr. Swartz?

A. I was requested, our Technical Organization was requested to search our files to gather together all of the rulings that have been issued in this particular area.

Mr. Davis: Then I object unless the area is identified and the date and the specifics of the request.

By Mr. Duncan:

Q. What do you mean by this area?

A. The area that was explained to me, the area being all rulings issued in connection with requests by taxpayers or affiliates to file consolidated returns where one of the affiliates was an insurance company.

Q. Was this in connection with an affidavit that you eventually filed in the District Court?

A. That is correct.

Mr. Davis: I move to strike the answer.

By Mr. Duncan:

Q. Do you remember, Mr. Swartz, how you received this request?

A. Yes. Mr. Levine, and I believe one of the representatives of the Department of Justice called on me in my office. I don't recall the date.

Q. Was this three or four months ago, during the fall?

A. It was during the fall. It was shortly before the affidavit was filed.

Q. Who did you give instructions to?

A. Mr. Levine.

Q. Were there a limited number of specialists in the Corporations Branch dealing with this particular area?

A. Yes, ordinarily in this specialty there are usually two people that handle these particular requests at any given time.

Q. Can you tell us who those were?

A. Mr. Deutsch and, I believe, Mr. Driscoll, or Carey

ROSS. (After consulting with aide) Mr. Deutsch and Carey  
ROSS.

Q. What specific instructions did you give Mr. Levine?

A. The instructions really were in connection with the request of the Department of Justice to get copies of these

rulings and I asked Mr. Levine to comply with the request from the Department.

Q. Was this a request to get all of the rulings?

A. To get all of the rulings.

Q. Was this a request as to what your practice in this area was?

Mr. Davis: I object.

Mr. Duncan: I think I'll take the answer.

Mr. Davis: This is—

Mr. Duncan: I'm taking an answer over your objection.

Mr. Davis: This is patently a leading question, if counsel please.

Mr. Wilson: You brought it up. You wanted to know when and under what circumstances. We're trying to answer your question.

Mr. Davis: I see. You can let Mr. Swartz develop his testimony in a different way.

Mr. Wilson: In answer to question.

Mr. Davis: But not in answer to a leading question.

Mr. Wilson: Let's take the answer.

Mr. Duncan: I'll take it over the objection.

The Witness: Well, the request that I asked Mr. Levine to comply with, as I understood it, was to search out our files to get all rulings issued in connection with this particular area which is whether or not a group of affiliates, which include an insurance company, may file consolidated returns and under what circumstances.

By Mr. Duncan:

Q. Were these particular rulings that were brought to your attention, identified here, brought to your attention by Mr. Levine?

A. Yes, they were.

Q. And he was working under your instructions?



Mr. Davis: Objection.

By Mr. Duncan:

Q. Go ahead.

Mr. Davis: There are appropriate methods of eliciting this testimony without having the witness led, to specify the date, the next date when he had occasion to consider the matter after he gave the assignment.

By Mr. Duncan:

Q. Could you tell us when, what date these were brought to your attention by Mr. Levine, or approximately when?

A. I don't know. At this point, no, I can't tell you the exact date.

Q. Would the date of the affidavit refresh you?

A. It might help. I think I have a copy of it here, September 22, 1961.

Q. Would that have been the date when they were brought to your attention by Mr. Levine?

A. I think they were brought to my attention before I signed the affidavit, shortly before September 22, 1961.

Q. Was your affidavit in answer to the request of the Department?

A. It's the answer, as I understood it, yes, sir.

Q. By the "Department", I was referring to the Department of Justice.

A. Right.

Q. Could you tell us whether these rulings were all, the identified rulings are all the rulings in this area which could be located?

Mr. Rothe: Object.

Mr. Davis: Objection.

Mr. Rothe: There has been no showing Mr. Swartz is competent to testify to matters sought after in the question.

By Mr. Duncan:

Q. Did you discuss the search for these rulings with Mr. Levine?

A. Yes, I did.

Q. He was working under your general instructions?

A. Yes, he was.

Q. Did you send him back again to search for others?

Mr. Rothe: Leading.

Mr. Duncan: I assume you're objecting.

Mr. Rothe: Yes.

Mr. Duncan: I think I'll take an answer to that.

The Witness: I asked Mr. Levine to get all of the rulings in this area that he could find.

By Mr. Duncan:

Q. Did Mr. Levine—

Mr. Davis: Object as to when, when was this, this question? The witness has testified previously that he asked him to carry out instructions of the Department of Justice. Was this a second date that there were further directions or requests? There is no specification as to time or place.

Mr. Duncan: It's the same request, as I understand it, Mr. Davis. We asked him to find everything.

The Witness: Maybe I could indicate at least that at various times Mr. Levine came to me saying that they had searched this—

Mr. Rothe: Objection, hearsay.

Mr. Duncan: I think I'll take that. I'll take that.

By Mr. Duncan:

Q. Go ahead, Mr. Swartz.

A. That he had searched these files and found certain ruling letters.

Q. Mr. Levine is an employee of yours?

A. That's correct.

Q. He was working under your instructions?

A. Yes, he was.

Q. Was this in part prior to the affidavit and in part subsequent to the affidavit, the date of the affidavit?

Mr. Rothe: I object to the form of the question. I don't understand it.

By Mr. Duncan:

Q. Were these discussions with Mr. Levine with respect to the search he had made in part prior to the affidavit and in part subsequent to the affidavit?

Mr. Davis: This is obviously leading. I object on that ground.

By Mr. Duncan:

Q. When were these discussions with Mr. Levine?

A. I had discussions with Mr. Levine with respect to this search—

Q. That he was doing for you?

A. —that he was doing for me prior to the affidavit and after the affidavit.

Q. What did Mr. Levine report to you with respect to these rulings?

Mr. Rothe: Objection, hearsay.

Mr. Duncan: I think I'll take the answer.

The Witness: At various times Mr. Levine reported that they had located files in the Precedent File, in the general files and in the specific—in the files of the—Mr. Deutsch's file at the present time. Mr. Deutsch had files of copies of rulings in this particular area which—apparently he had issued some, and which his predecessors in this particular area had also issued.

Mr. Davis: I move to strike the answer. There has been no foundation for showing that rulings in the private

files of the specialists had been issued or in what manner they were treated. You have no foundation.

Mr. Duncan: I don't understand the objection. I am referring to these right here that have been identified.

Mr. Davis: You have not identified any such file as having originated with one of these specialists, compared with the—

Mr. Duncan: That's right, I haven't. None of these came from the specialists' files.

Mr. Rothe: He just testified that they did.

The Witness: May I clarify that? The specialists' files were scrutinized in order to get the names of the rulings which were then further searched in the general files and the Precedent File to be sure that we had everything that had been issued in this area.

By Mr. Duncan:

Q. Are you sure?

A. Well, as sure—I can't be sure that there are other rulings out but I assume that by the search that was done that we have all of the rulings that were issued in this area pertaining to those dates.

Q. What reasons do you have to believe that you have them all?

A. The reason that is that the specialists keep copies of these rulings that they issue in this particular area. We had all of those to search further into the general files and the Precedent Files. In addition, we also searched the general files and the Precedent Files and we found no other rulings in those searches other than those that have been introduced here as exhibits.

Q. That have been identified.

A. Identified as exhibits.

Mr. Davis: I move to strike the answer on the ground that the witness obviously does not of his own knowledge know that these are all the rulings found.

Mr. Duncan: I have your objection, Mr. Davis.

By Mr. Duncan:

Q. Based on your knowledge, is it possible there could be a contrary ruling to these?

A. Based on my knowledge—

Mr. Rothe: I object to the witness' speculation. The question calls for a speculation.

Mr. Duncan: I think he's been qualified. I'm taking the answer.

Mr. Davis: Objection. There has been no qualification of this witness as one qualified to evaluate the substance of these rulings. You have not qualified him as an expert, in fact the contrary; that he has had to rely upon other experts to make this search and to determine their existence.

Now, if you are going to qualify him as an expert in this field—

Mr. Duncan: I'm not qualifying him as an expert to testify as to the substance of this matter. I am asking him to testify as to the filing procedures. He has testified with respect—we've asked him to testify as to what files his office keeps and he has so testified. I am asking if it is possible or reasonably possible for rulings to have escaped in this particular area, for us not to have located rulings in this particular area.

Mr. Davis: I object on the ground that it calls for a conclusion.

First of all, he has to have an opinion as to what these rulings—the question would require him to have an opinion as to what the rulings hold; and, secondly, to speculate on matters which are beyond his own knowledge.

Mr. Duncan: All right. Let's let him testify as to what the rulings hold.

By Mr. Duncan:

Q. What do the rulings hold?

A. The rulings, the rulings in effect hold that where there is an affiliated group of corporations of which one is an insurance company that consolidated returns can be filed under those circumstances, provided certain changes are made in the filing of the various returns to coincide with the filing period of the parent. So that the affiliate may file consolidated returns—

Mr. Davis: I move to strike the answer on the ground that it is a conclusion which this witness has not been qualified to give.

Mr. Duncan: I think we will take it along. The rulings, of course, do speak for themselves.

By Mr. Duncan:

Q. You have looked these rulings over?

A. Yes, I have.

Q. I think I'll repeat my question. Is there a reasonable possibility that rulings holding to the contrary were issued during this period?

Mr. Rothe: To the contrary to what?

Mr. Duncan: To the contrary of the rulings identified or under similar circumstances.

Mr. Davis: Object. There has been no assertion, except in the vaguest terms of conclusion and therefore to negate the existence of something contrary to such an assertion is also obviously a conclusion and therefore an improper question.

Mr. Duncan: Let's take an answer on that.

Would you read back the question so that he can hear it, if you would, please.

(The question was read by the reporter.)



The Witness: It had to be probable that any other rulings or any rulings issued in this area during the period involved did follow the same patterns as the rulings that we have before us as exhibits.

This is for the reason that when a ruling is placed in the Precedent File that if any ruling contrary, or this practice has not been followed in the future, that the precedent on which rulings were based would have been removed from the Precedent File then and not to be followed any more. So that, if any rulings, any requests for rulings in this area that had come up other than the ones that we have marked as exhibits, they would either have followed the principles of the rulings that were issued, and any rulings to the contrary would not have been issued without removal from the Precedent File of the previous rulings.

Mr. Davis: I move to strike it on the ground that it calls for a conclusion and that there has been no testimony whatsoever as to what the practice is.

Mr. Rothe: And also that the answer is not responsive to the question.

The Witness: I thought I was responding to the question.

By Mr. Duncan:

Q. I think your answer was responsive to the question, Mr. Swartz.

A. May I add to this last statement?

Q. Certainly, go right ahead.

A. One reason for my answer is that these precedents were approved by the Commissioner's office and the Chief Counsel's office.

Q. How do you know that?

A. Based on the initials appearing on the—

Q. On the identified—

A. —on the identified documents.

Q. For example, let's look at one of these and see if we could tell, sir. Let's look at Defendant's Exhibit 3. Let's look at Defendant's Exhibit 4 for identification, the second page, those are the initials you are referring to?

A. Yes. The initials appearing on the last page of the Exhibit 4.

Q. Which initials in particular, could you go across there and identify the officers as certain of the initials?

Mr. Davis: Well—

By Mr. Duncan:

Q. What do the initials represent?

A. The initials represent the initials of the people who considered this particular issue. They represent the initials of the people in the Income Tax Unit, including the Technical Advisor to the Deputy Commissioner of the Income Tax Unit, and they also—

Q. Could you identify those initials, which were they?

A. FTE is the Technical Advisor to the Deputy Commissioner.

Q. Who was he?

A. That was Frank Eddingfield.

This letter also was referred to the Office of the Chief Counsel.

Q. How do you know that?

A. Because of the initials that were—initials that are appended to the document.

Q. Which initials?

A. There's—I can't identify the names of all of them, there's SHB, but the one in particular is JPW who is, was the then Chief Counsel, Mr. Wenchel, and that was ini-

tialed for Mr. Wenchel V, I believe was Mr. Vogel. It has been further initialed by the Technical Advisor to the Commissioner of Internal Revenue and by the Commissioner so that this particular ruling was initialed by the Income Tax Unit, by the Chief Counsel, by the Commissioner's Office and placed in the Precedent File.

No one in the Income Tax Unit could have issued a ruling different or contrary or taken a different position than that letter without again having to refer this difference of a position back to the Chief Counsel or the Commissioner's Office, and at that point had any position been changed in this matter the file would have been removed from the Precedent File, and since the file still remained in the Precedent File and is still in the Precedent File it is an indication certainly that there is no probability that any contrary ruling was issued.

If there were any rulings that we don't have that were issued in this area, they would have been issued along the same lines.

Mr. Duncan: I think then at this time I will offer the identified exhibits, 1 through 7, with appropriate A, B, and Cs, whatever they were; I'll identify them:

1, 2, 2-A, 3, 4, 4-A, B and C, 5, 5-A and B, 6, 6-A, 7 and 7-A.

Mr. Davis: I object to the introduction into evidence of these documents, first of all, upon the ground that they have not been shown to provide, shown by anyone established as an expert in the field of consolidated returns of taxpayers and familiar with the subject as having been the object of Mr. Swartz' review and attention; secondly, those which were offered after or relating to times after December 31, 1950 are obviously irrelevant to the point of time—

Mr. Duncan: I'm not sure I understood the first part of your objection, Mr. Davis. Could you spell that out a little bit more, if you could? Just how have these not been shown—you say they have not been shown to be what?

Mr. Davis: They have not been shown to relate to a specific identifiable and demonstrated practice and therefore they are not relevant to the issue of whether or not the taxpayer had a privilege to file a consolidated return for its first taxable year under subchapter E of the Internal Revenue Code of 1939, namely the taxable year ending December 31, 1950. There is no showing of any practice which relates to the requirements of Internal Revenue Service for consent to change an accounting period which would have been requisite to the admissibility of these documents.

Mr. Duncan: It is your position then that the rulings themselves do not show any practice; the rulings cannot speak for themselves?

Mr. Davis: My objection is that these documents have not been shown to be relevant to the issues in this case.

Mr. Duncan: Okay.

Mr. Davis: And they are not competent here to speak for themselves on the foundation which you have laid for them.

Mr. Rothe: I think we need to establish for the record the purpose for which you are offering these exhibits.

Mr. Duncan: I think the record is rather clear on that. On our brief in opposition to your motion to strike the affidavit we state the purpose of the proof of practice and it would be our view that the rulings speak for themselves. They show what the Revenue Service did in many cases as Mr. Swartz has identified and testified, that they were actually issued, and that the rulings themselves set forth what was done and that this was a practice.

Mr. Rothe: I am still not sure I understand the purpose for which you are offering the exhibits, and if you would care to state that for the record, we would like to have it. If you do not care to state it for the record, that's fine, too.

Mr. Duncan: As I said, we stated it in our brief. The purpose of this is that Allstate and Sears could have filed a consolidated return for the first taxable year under the Korean War Excess Profits Tax Act, if they had so desired.

Mr. Rothe: That does not answer my question, but if you are content with that answer, that's fine.

Mr. Duncan: These rulings actually constitute the practice in this area.

Mr. Rothe: That is the purpose for which they are offered?

Mr. Duncan: And therefore they actually show, they are relevant and probative to show what would have happened if Allstate, Allstate and Sears had filed or desired to file a consolidated return, even though, of course, they did not.

Mr. Rothe: Do I understand you to say, Mr. Duncan, that the purpose of offering these exhibits is to show that there was a practice and that these exhibits themselves show the practice, and that is the purpose for which they are being offered?

Mr. Wilson: In part, you're correct.

Mr. Rothe: Will you state for the record the purpose for which the exhibits are offered? We can't very well make an objection to the exhibits without knowing the purpose for which they are offered.

Mr. Wilson: You cut him off short there. You stated about a quarter of what he stated as to what his purpose was just now, on the record.

Mr. Duncan: I'm not going into great detail here. It is our view—I'll say it again, Mr. Rothe—that these ex-

hibits show what the Internal Revenue Service did in particular cases. The testimony is that this was practice, and this was what we done and these were all that were done, they show a policy or practice. They spread over considerable time, they show what would have happened if Allstate and Sears had desired to file consolidated returns and had come to the Internal Revenue Service so desiring and expressed their desire.

Mr. Rothe: That is the purpose for which these documents are offered?

Mr. Duncan: This is also to show that there was an administrative practice reflected through these rulings, through these identified documents, which is relevant here in considering the issues in this case, the legal issues in this case.

Mr. Rothe: Are you saying that the practice was reflected by these documents or that these documents constitute the practice?

Mr. Duncan: I think that's semantics. These documents represent decisions that were made and set out decisions that were made to individual taxpayers in response to request for advice.

One request, the '44 request, came from the Internal Revenue Agent in charge, in a particular area, but the others were actually on requests and the documents so show, I believe.

I think that has sufficiently set forth the purpose for which the documents are being offered.

Mr. Rothe: Then we further object—

Mr. Wilson: I reiterate, the purpose has been set forth at the time and in the transcript of the hearing.

Mr. Rothe: We further object, in addition to the objections posed by Mr. Davis, on the ground that there has been no foundation laid which would make these documents relevant to the purpose you have stated.



Mr. Duncan: I think we will let it go at that, then.

By Mr. Duncan:

Q. Let's refer to Defendant's Exhibit 2, the ruling letter of May 26, 1945; was anything special done with that ruling?

Mr. Davis: I object. Mr. Swartz wasn't even in the Internal Revenue Service. Oh, he was Technical Advisor to the Deputy Commissioner of the Income Tax Unit.

By Mr. Duncan:

Q. Do the files indicate that some special procedure was used with respect to that ruling?

A. The files—

Mr. Duncan: Go ahead, if you want to object.

Mr. Davis: I would like to object if he is going to answer more than yes or no.

Mr. Duncan: All right.

The Witness: How shall I answer it?

By Mr. Duncan:

Q. Add "yes" or "no".

A. Yes.

Q. All right. What was that, what do your files indicate with respect to that ruling?

A. The files—

Q. Wait a minute.

Mr. Duncan: Do you want to object?

Mr. Davis: I object to him reading from the files—

Mr. Duncan: All right, he doesn't have to read from the files. He can tell us what was done.

By Mr. Duncan:

Q. What was done, Mr. Swartz?

A. This ruling, Exhibit 2, was circulated to our field offices and designated as what we call an unpublished ruling.

Mr. Davis: I object; it's hearsay and would be inadmissible.

By Mr. Duncan:

Q. How do you know that?

A. I know it from the fact that there is a copy in the files of a document which indicates that this was circulated to the field. An index card is given to these files that are sent to the field and they are filed in the field offices under that index title.

Mr. Davis: I object unless there is a proper method for proving whether or not this document was circulated in the specific manner.

Mr. Duncan: I am startled, frankly, Mr. Davis, because I thought this was stipulated and I was just going into this, but if it is not, we will—

By Mr. Duncan:

Q. Can you tell us about this procedure of your own personal knowledge? What was this, of your own personal knowledge of this procedure?

A. As a Revenue Agent when I was in New York we periodically got these mimeographed copies of rulings which were issued to taxpayers with instructions and with an index card attached, with instructions to put these in the files and to file the index cards, the index cards being under a title which could be referred to as being rulings issued by the National Office.

Q. What was the purpose of this, of this distribution?

A. The purpose of the distribution system was for the aid of our field offices to get the reasoning behind rulings that were issued by the National Office for their information.

Q. What were they supposed to do with this, what were the field offices—strike that.

What function did these serve in the field offices?

A. They served as reference material for agents when they encountered problems or issues that involved the issue that was listed on the index card.

Q. Did they serve—is there any similarity between the function they served and the Precedent File in this office?

Mr. Davis: Object.

Mr. Duncan: I think I'll take an answer.

The Witness: The Precedent File in the National Office was generally utilized by the people who were answering requests for rulings as being precedents and positions set by the Service in that particular area.

The copies of these particular rulings which were sent to the field were to be used for the same purposes. While the field did not issue rulings as they did in the National Office, nevertheless, the issue involved was to be referred to by the Revenue Agents, or was for their convenience if they wished to refer to it.

Mr. Duncan: I think that completes our examination, Mr. Davis.

Would you like to have a short break before you start.

Mr. Davis: I think that would be helpful.

(Whereupon, the taking of the deposition was suspended at 12:13 o'clock p.m. for the taking of the luncheon recess to be resumed at 1:30 o'clock p.m. of the same day.)

#### AFTERNOON SESSION

(The taking of the deposition was resumed at 1:30 o'clock p.m.)

Whereupon

HAROLD T. SWARTZ resumed the stand and having previously been sworn was examined further and testified as follows:

#### *Examination on Behalf of Plaintiff.*

By Mr. Davis:

Q. You are the same Mr. Swartz who testified in this cause this morning as Assistant Commissioner of Internal Revenue?

A. That's right.

Q. Would you refer to the first conference which you had with representatives of the Department of Justice with respect to initiating the search of your files. Just who was present at the time?

A. I really don't recall. Maybe I can, I don't know whether I can refer that to Mr. Levine and the representative of the Department of Justice.

Q. Was that Mr. Duncan, the present counsel?

A. No, I don't believe it was. It was not, no.

Mr. Duncan: I will go off the record for a minute, if you would want.

(Discussion off the record.)

Mr. Duncan: Back on the record.

By Mr. Davis:

Q. How many people called on you in your office at that time?

A. This was just a basic routine call, as I remember; there may have been two or three. I recall Mr. Levine was there and I guess there was a representative of the Chief Counsel's Office and someone who I understood was from the Department of Justice.

Q. Who spoke first?

A. I believe Mr. Levine. He merely introduced the people and told me that they were looking for these ruling letters that had to do with this case.

Q. This Mr. Levine said that they were looking for ruling letters relating to this case, and by "this case", you mean Allstate Insurance Company?

A. They said that they were looking for some—I can't recall the exact conversation—Mr. Levine, I think, merely spoke, this was so and so and so and so, and said that in connection with the Allstate case that they were searching,

they wanted to search the files for ruling letters which had been issued on this consolidated issue. I can't recall the words, but it was words to that effect.

Q. What did you think they were asking about when they referred to the consolidated issue?

A. I was somewhat familiar with the issue involved in this case. I believe that I had had occasion probably when I was Director of the Tax Rulings Divisions to go somewhat into this issue.

The issue, as I recall it, was the question as to whether or not in an affiliated group, the parent corporation being on a fiscal year basis could file a consolidated return, the affiliates could file a consolidated return when one of the affiliates was an insurance company. The question, as I understood it, being that under regulations an insurance company had to file on the calendar year basis; the regulations under consolidations required the affiliates to be on the same taxable year as the parent, so obviously there was a question there as to whether or not under such circumstances consolidated returns could be filed.

Under those circumstances, as I had remembered it, even when this question was presented, in looking through the files, it was that we had come to the conclusion that inasmuch as Congress had intended to allow, allow affiliates—

Q. Was this discussed? Is this something that you said to somebody during this conference?

A. No; oh, no, not at this time. I was just saying, I was just commenting on my familiarity with the subject when it was presented to me in connection with searching the files.

Q. What did you tell Mr. Levine to do and what did you say at this meeting?

A. Here again I don't recall the exact language, but I said that we wanted to cooperate wholeheartedly and to give the Department of Justice anything that we could find in this area.

Q. Was there any written communication to you from the Department of Justice on the matter?

A. Not that I know of.

Q. Was there any suggestion as to how this information would be made available to the Department of Justice?

A. I think we were to hand them copies, I don't recall. As I understand it, we were to find these copies in our files on the subject and give them to the representatives of the Department of Justice. What they at this point—I think at that point I wasn't too sure what they were going to be used for, whether they were going to—I was familiar with the fact that we couldn't allow these to be disclosed to the public because of the names on the rulings.

Q. How long was it after this, what were your instructions specifically to Mr. Levine and the person from the Chief Counsel's Office?

A. I don't think I can be specific. I merely told Mr. Levine to go ahead with the search.

Q. Did you specify how he was to do this?

A. Not particularly, no, I don't think I specified how the search should be made. Mr. Levine was an employee, and knew where the files were.

Q. When did you next discuss this subject with anyone in the Department of Justice?

A. I think there were several discussions or several communications with Mr. Levine and—

Q. Were these oral or written?

A. These were oral, these were oral discussions. Mr. Levine from time to time as they found the copies would merely advise me of the copies that he had found.



Q. What was the scope of this search, was it to cover all of the files of the Internal Revenue Service from the beginning of time or was there any time limitation?

A. Insofar as I was concerned, no. It was just to find all the rulings we could within reason, find all the rulings we could in our existing files with respect to this issue.

Q. About how many times did you meet with Mr. Levine before you next met with the representative of the Department of Justice?

First of all, did you have any further conferences with the representative of the Department of Justice?

A. Yes, I think there were several discussions later on with respect primarily to how to present the rulings or what we could use in the rulings, what had to be cut out. I wasn't too sure what was to be done with the rulings. It was my understanding that we were merely to get these rulings out and furnish them to the Department of Justice.

Q. There has been a prior reference here to an affidavit executed by you.

A. I think I have a copy of it.

Q. Would you just describe the circumstances under which this affidavit was first suggested to you?

A. Yes. I believe, here again, as I remember, and again I don't remember the name of the man in the Department of Justice but a gentleman from the Department of Justice and Mr. Levine came into my office with a proposed copy of an affidavit and showed it to me, and I read it and then the thought was that we may ask you to make this affidavit.

Shortly thereafter then I did make it.

Q. What was the elapsed time between the time of the suggestion and the time of execution?

A. I think approximately two or three days.

Q. How did Mr. Levine report to you?

A. Orally.

Q. What was the substance of his report to you most immediately before the decision with respect to execution of an affidavit?

A. He reported to me that primarily he had discovered these rulings. As they found them he would informally come down and say, "We have located another ruling" and he would show it to me. I think he told me at this time they were from the files that they had found in the experts' offices and the conferences, that they had also searched the Precedent Files and the general files, to get the regular files out and the carbon copies that they had located.

Q. Were these files left with you?

A. Carbon copies of the letters were left with me at that time, but I had them for a while to look at, yes.

Q. What else did you do?

A. At various times I had all of this material, I think, that's been discussed here.

Q. Specifically, did you have all of the exhibits, A, B, C, D, E, F and related matters before you, before your execution of your affidavit?

Mr. Duncan: Counsel, I seriously object to this. We have stipulated that we discovered one ruling after that. We stipulated this, that one ruling was found, the '51 ruling was found after.

Mr. Davis: I am asking Mr. Swartz, if counsel will just confine himself, this is certainly an area of interrogation in cross-examination as to on what the affidavit was based, and Mr. Swartz is best qualified to respond to that.

Mr. Duncan: Are you rescinding your agreement to the stipulation?

Mr. Davis: No.

Mr. Duncan: All right, then.

Go ahead, you can answer, Mr. Swartz.

The Witness: I don't recall whether I had all of the numbered exhibits, I don't believe that I did have at that time the exhibits that are numbered A, B and C, some of the requests with respect to the files.

By Mr. Davis:

Q. But you think you had all of the ruling letters; is that correct?

A. I don't know as I had all of them that were here. I think there were five or six at the time.

Q. Did you read all of the papers in each file before executing the affidavit?

A. I read the ruling letters.

Q. Just the ruling letters.

Do you know who prepared the affidavit?

A. No, I do not.

Q. Were there any changes made between—to your knowledge between the time it was first presented to you and the time you executed it?

A. Not that I recall. As I remember, the affidavit that I signed was at least substantially the same as the proposed copy. There may have been a change or two.

Q. You indicated that a search was to be made of "our existing files", Internal Revenue Service.

A. It had to be files that existed.

Q. Is there any limit to the duration of the period of time that these rulings were to cover as a terminal date beyond which the search would not go?

A. No, there was no time limit set. It was all rulings.

Q. And that's up to—

A. As far as I knew, as far as my knowledge is concerned.

Q. That's up to September 22, 1961?

A. At the time I signed this, yes.

Q. Did this search cover any other offices within the Internal Revenue Service than the Assistant Commissioner, Technical?

A. I don't believe so. I think the general files and the Precedent Files are located within the Technical Organization.

Q. Now, would you go into this Precedent File, just whose responsibility it is to determine whether a ruling is in the Precedent File category?

A. I'm really not sure. I think that these are digested. In other words, the author of the ruling is to determine whether or not this establishes a precedent, whether or not this is the first time this issue has been raised, or whether this is a variation of a precedent, whether a precedent has been established and whether it would be worth while being put in the file to which reference need be made by other people.

Obviously, the Precedent File, the purpose is to separate out the specific precedents on which other rulings are based so that the Precedent File doesn't contain these 30,000 rulings, on the precedents.

Q. Anything in the Precedent File then is the basis for issuance of rulings in other situations, is that correct?

A. They can be used, it indicates a precedent that has been set, a position that has been adopted and can be referred to as having been ruled on before.

Q. I see.

A. It's part of a research job. It's like researching, along with regulations, published rulings, we also research precedents set in the unpublished rulings.

Q. What is the relationship between the Precedent File procedure and the rulings policy of Internal Revenue Service?

A. It wasn't until 1954 that we adopted our present rulings policy. Prior to 1954, rulings, published rulings were made in some cases of matters that were put in the Precedent File, not all of them. Our policy with respect to publication of rulings prior to 1954 was that we would publish rulings of widespread interest in something that we thought would affect a lot of taxpayers.

I think we probably published 60, 70 or 80 rulings in those days whereas now we are publishing 5 or 600.

Mr. Duncan: Could I clarify that? Do you mean annually?

The Witness: Annually.

By Mr. Davis:

Q. Had there been a policy of Internal Revenue Service as announced to the public that no unpublished ruling would be applied in the disposition of any case, any other case?

A. No unpublished ruling?

Q. Yes. If you know, to your knowledge.

A. What time? I mean, this—is there any period of time that you are referring to?

Q. During the period from 1945 to 1951.

A. To '51.

Q. Yes.

A. Those unpublished rulings were not to be cited; that is, they weren't to be cited by name because of the disclosure policy.

These copies of rulings that were sent out to the field were just—had names of taxpayers on them, they weren't digested, they were copies of the actual rulings, and the Revenue Agents were warned not to cite those as being issued to taxpayers, because we were prevented from doing so by law. They obviously were to be used for reference purposes, otherwise they wouldn't have been sent to the field.

Q. Was there not an announced policy that no unpublished ruling would be relied upon in the disposition of any case?

A. I don't recall now, but I think probably the language in the Internal Revenue Bulletin was such that unpublished rulings should not be cited or relied upon.

Q. Is this cited?

A. Cited or relied upon. That ordinarily was to take care of the disclosure provision.

Q. What makes you think that it was only to take care of the disclosure provision?

A. This certainly was an assumption because the copies of rulings were sent out to the field offices and were relied on by Revenue Agents but not cited by Revenue Agents.

Q. Who made the decision for example in respect of the ruling—strike this question, please.

Do you know how the rulings which were not referred to, or which had not been discovered at the time of the execution of your affidavit were located?

A. Not precisely, no. Mr. Levine from time to time merely asked me or told me that they had located another.

Q. Do you base your opinion that there were no rulings issued contrary to the Exhibits A, B, C, D, E, and F—

Mr. Duncan: 1 through 7.

Off the record.

(Discussion off the record.)

Mr. Duncan: Back on the record.

By Mr. Davis:

Q. Mr. Swartz, referring to Exhibits, Defendant's Exhibits 1, 2, 3, and 4, you have stated that there are no rulings—

A. 1 through 4.

Q. Yes. (Continuing) —no rulings contrary to those rulings issued at any time from 1944 on to December 31, 1950; is that correct?



A. I'm not sure of that. Would you restate the question, please?

Q. Yes, sir.

First of all, let's refer to them one at a time.

Referring to Exhibit 1, this is a letter ruling dated February 14, 1944.

A. Yes.

Q. You have stated that there was no likelihood, no probability of the issuance of a contrary ruling.

A. I think what I stated was that it was unlikely that there were any contrary rulings issued holding that an affiliate could not file consolidated returns where a parent was on the fiscal year basis and an insurance company was on a calendar year basis, provided they followed the instructions in the ruling contained in our rulings.

For example, I think the Exhibit 1 ruling held that an insurance company—held that an insurance company could not shift to a fiscal year in order to file consolidated returns. I don't think there is anything that has been issued contrary to that particular letter insofar as the filing year is concerned.

Q. Does the ruling stand for anything else, beyond what you have just stated?

A. Does that particular ruling stand for anything else?

Q. Yes.

Mr. Duncan: Take your time, Mr. Swartz.

The Witness: (Consulting exhibit) In this particular case I think a ruling had been issued granting consolidated returns on a fiscal year basis, and this ruling was to tell them that that ruling was erroneous, that this could no longer be accepted and that therefore we revoked the previous ruling which was dated December 11, 1941 and held that they had to file their returns on a calendar year basis after that date.

But if a consolidated group obtained permission to change to the calendar year basis, that a consolidated return would be required for the month of December 1944, and also in the event that the remainder of the group elected to file on a fiscal year basis, the company would be required to file a separate return for the month of December in order to again place them on a calendar year basis.

Mr. Davis: Would you please repeat my question.

(The question was read by the reporter.)

The Witness: Well, the ruling stands for what is contained in the ruling letter; in the ruling letter we said that under the Income Tax Regulations an insurance company had to file their returns on a calendar year basis, and therefore permission should not have been granted to change to a fiscal year basis.

By Mr. Davis:

Q. Do you have this file here with you, the file containing the original carbon of Defendant's Exhibit No. 1?

(A folder was handed to the witness by counsel for Defendant.)

Mr. Duncan: Answer the question.

The Witness: Yes.

By Mr. Davis:

Q. Would you indicate what is the writing on the cover of this folder? So that it can be identified.

A. This is identified as a file of the Practice and Procedure Division of the Bureau of Information and Rulings Section, the Income Tax Unit.

Mr. Duncan: Let the record also show that the file contains the name of the taxpayer to whom the ruling was issued.

Mr. Davis: I have no objection.

By Mr. Davis:

Q. Would you describe the first document which appears in this file?

A. The first document?

Q. Yes, that is the first—if there are pages attached to either side of the file, would you give the pages—

A. On the lefthand side of the file is stapled a document called A Rulings Publication and Distribution Memorandum. This is a memorandum which is prepared, I guess, usually by the originator of the ruling as to whether or not this ruling should be submitted for publication.

Q. Is there a recommendation as to publication, sir?

A. Yes, the recommendation is no.

Q. Is there any indication why?

A. Yes, the reason is that calendar years are required for insurance companies, the accounting period is the same as the parent, and that the ruling is based on administrative expediency which is served in handling this case.

Q. Is this the comment with respect to the letter dated February 14, 1944, marked Defendant's Exhibit No. 1?

A. This has to do with—this is, actually this refers to, the digest reference is to a date of a communication to the Internal Revenue Agent in Charge in Chicago, inasmuch as this was in response to their question as to whether or not our original ruling was correct, a request for technical advice in connection with this particular tax letter.

Q. What is the second paper on the lefthand side of the folder?

A. That is all.

Q. I see. All right, then, beginning with the first paper, perhaps next to the bottom.

A. Starting at the bottom—

Q. Will you excuse me, please. Was what you said about what is on the first paper, the exact words that are written there?

A. Well, it's in digest form. I'll repeat what's written there, if you would like me to.

The question is: "Should ruling be submitted for publication?" The answer is "No". It goes on to say: "If not, state reasons". The reasons stated are: "Calendar year required for insurance companies, Section 29.204-1 Reg. 111."

The next line is: "Accounting period same as parent, Section 24-14, Reg. 104".

The next sentence is: "Balance of ruling, administrative expediency suited to this particular case".

Q. The first document on the righthand side of the file at the bottom?

Mr. Duncan: On the bottom.

The Witness: Are these all right?

Mr. Duncan: Yes, tell him what they are.

The Witness: The first document is a memorandum commonly designated as a GCM, General Counsel's Memorandum, addressed to the Deputy Commissioner of the Income Tax Unit from the Chief Counsel of the Bureau of Internal Revenue.

By Mr. Davis:

Q. What is the date?

A. The date is February 1, 1944.

Q. All right. What is the next document?

A. The next item is merely a transmittal form, I guess this—it's a transmittal form regarding this taxpayer to the Head of the Practice and Procedure Division to the attention of the Information and Ruling Section.

Q. What does it transmit?

A. It transmits, this says there are enclosed in accordance with paragraph 832 of the Income Tax Manual two carbon copies of a letter addressed to the Internal Revenue Agent under date of March 7, 1944 in response to an inquiry made under paragraph 630 of the Internal Revenue Agent's Manual.

The next document is a ruling letter dated February 14, 1944 to a taxpayer in response to a request for a ruling dated December 11, 1941, signed by the Deputy Commissioner of the Income Tax Unit.

Q. Is this a copy of the document offered in evidence here over objection of the plaintiff, Defendant's Exhibit 1?

A. Yes.

Q. What is the next item?

A. The next item is a memorandum or letter dated March 7, 1944, to the Internal Revenue Agent in Charge, Chicago, Illinois, signed by the Deputy Commissioner of the Income Tax Unit.

Q. What is the next one?

A. The next one is a digest for the subject file. This is a digest which is made for the subject file, the Precedent File, outlining in digest form what the ruling contains that is to be digested.

Q. The file does not contain the letter dated December 11, 1941 addressed to the Collector of Internal Revenue?

A. This is all that's in the file; it does not contain the letter, no.

Q. In the usual course, where would such a letter be?

A. This apparently was a letter, the letter of December 11, 1941 referred to was addressed to the Collector of Internal Revenue at Detroit, and the Collector furnished a copy of that ruling to this taxpayer for his files. The letter of December 11, 1941 apparently was at the request

of the Collector of Internal Revenue with regard to a request addressed to the Collector by the taxpayer, so apparently the Collector would have this file. We referred to a letter addressed to the Collector at Detroit, a copy of which was furnished for your files, "Your files" being the taxpayer.

Q. This digest of the letter ruling, what is the substance of that?

A. After digesting—

Q. Would you care to read it?

A. If there is no taxpayer.

Mr. Duncan: Let's look at it. It is somewhat lengthy. There is nothing, no problem in it, but I don't want to take up Mr. Swartz' time. I do suppose we could get a—well, why don't you read it, it isn't too lengthy. Leave out the taxpayer's name.

The Witness: Leaving out the taxpayer's name, this says:

Blank in substitution for the taxpayer's name "(100 per cent subsidiary of" blank "corporation) is a stock casualty insurance company, taxable under Section 204 of the Internal Revenue Code. It filed income tax returns on the calendar year basis for 1939 and 1940, but in order to join with its parent (which files its returns on the basis of a fiscal year ending November 30), it secured permission under date of December 11, 1941 to change to the fiscal year effective for the period ending November 30, 1941. As insurance companies taxable under Section 204 of the Code are required to report on the calendar year basis, the permission to change accounting period was revoked by letter of February 14, 1944. Held, in view of the fact that consolidated returns were filed pursuant to authority granted, consolidated returns will be accepted for



taxable years ended November 30, 1941, 1942, 1943 and the taxable year ending November 30, 1944. Subsequent to November 30, 1944 consolidated returns will not be accepted unless such returns are filed on the calendar year basis. If the consolidated group wishes to change to the calendar year basis, effective as of December 31, 1944, application should be filed by the parent company in accordance with Section 29.46-1 Regulation 111. In the event that the group does not desire to file a consolidated return on the calendar year basis for 1945 and subsequent years, the members thereof will be permitted to file separate returns."

Q. Thank you.

What was the nature of the letter to the Internal Revenue Agent in Charge?

A. It makes reference to their letter in which technical advice is requested under paragraph 630 of the Internal Revenue Agent's Manual relative to issues arising in the case of this taxpayer for the taxable year 1941.

This is a full page letter, it—how detailed do you want this? It goes into the facts as described with respect to the years they were on. The Internal Revenue Agent in Charge apparently invites the attention of the Washington Office to the provisions of the Section 19.204(a)1 of the regulations stating that it appears to be apparent or it is apparent that the taxable year of this type of insurance company covered by Section 204 can be only a calendar year, and that the use of a fiscal year is not—is irreconcilable with the regulations.

It asks that our ruling granting permission to the taxpayer to change its accounting period from a calendar year to a fiscal year basis be reconsidered.

Q. By whom is that ruling issued in the original ruling?

A. This one I'm reading from?

Q. No, the ruling granting—

A. The original ruling?

Q. Yes. Is that apparent from the file?

A. We don't have a copy of the December 11, 1941 ruling. Is this the one you're referring to?

Q. Yes.

A. This is the one that—apparently what happened here was December 11, 1941 a letter was issued from the Washington office to the Collector of Internal Revenue in Detroit granting the taxpayer permission to file on a fiscal year basis.

Q. Yes. Now my question is where would that letter be?

A. That letter apparently was contained in the Collector's file.

Q. But would not a copy be here in the Washington Headquarters?

A. Ordinarily I guess it would. This file starts out in 1944, this particular file starts out with a February 1, 1944 document.

Q. Would there have been another file in the name of this taxpayer?

A. No, this is the file that has this taxpayer's name on it. I can't say that there wouldn't have been another file prior to 1944; I don't know.

Q. But who would have had the authority to issue a letter granting the consent to file a consolidated return on a fiscal year at that time?

A. In 1941 it would have been the Deputy Commissioner of the Income Tax Unit, or someone under him who might have authority to grant such permission. I don't know what the delegations of authority, what delegations of authority there were in 1941.

Q. Do you know whether, from your knowledge, the search of Mr. Levine did not disclose the file which contains this ruling letter dated December 11, 1941?

A. I assume that his search did not locate any such letter. We didn't discuss—I don't recall discussing it particularly, this particular letter.

Q. No instructions from you would have authorized him to fail to search for such a letter so it could have been found?

A. There was nothing that authorized him not to search for one, no.

Q. Then your instructions were that he was to have searched for all of them.

A. All that could be located in their files.

Q. Referring now to Exhibit No. 2, Defendant's Exhibit No. 2 offered in evidence over the objection of or subject to the objection of the Plaintiff—before proceeding with Exhibit No. 2, is there anything in the file which shows how it happened to get into the Precedent File?

Mr. Duncan: You're referring to the ruling letter of February 14, 1944?

Mr. Davis: Yes.

The Witness: How this got into the—

By Mr. Davis:

Q. How the ruling letter dated February 14, 1944 got into the Precedent File.

Mr. Rothe: Defendant's Exhibit No. 1.

The Witness: There is nothing—yes, in this document entitled Ruling Publication and Distribution Memo, one of the questions is "Should ruling be digested?" and the answer is "yes".

Q. What is the significance of that?

A. The significance is, I guess, that the ruling is important, was important enough to be placed in the Precedent File, digested and placed in the Precedent File, for future use.

Q. But the same document says not important enough to be published, in effect?

A. That's right, bearing in mind that our publication policy at that time was to publish rulings of a nature that would cover widespread interest, because there were quite a lot of rulings that were digested at that time that were placed in the Precedent File and even circulated to the field that were not published.

Q. Do you know when this practice began?

A. Which practice?

Q. The Precedent file.

A. No, sir, I do not. It was in existence when I came to Washington in 1943, and it must have been in existence considerably, a long time before that—at least, I am not so sure about the Precedent File, but insofar as circulating copies of these rulings to the field, we had them in the New York Office prior to that date.

Q. Now, to Exhibit No. 2, you indicated that you came to Washington in 1943; is that correct?

A. I came to Washington on detail in 1943 in connection with pension trust issues.

Q. Yes.

A. And was transferred to Washington in 1945.

Q. So that you have not had anything to do with the consideration of the problem which resulted in the issuance of Defendant's Exhibit No. 1?

A. No, sir.

Q. In regard to Defendant's Exhibit No. 2, did you have anything to do with the consideration of the problems which led to the issuance of that?

A. No, sir.

Q. Any opinion which you have as to what this ruling prescribes or determines as a position of the Internal Revenue Service is based upon simply your reading of the ruling; is that correct?

A. That's right.

Q. What do you think this ruling, Exhibit No. 2, stands for?

A. This is a request from a taxpayer whose—from an affiliate whose parent was on a fiscal year ending June 30, '45 in this particular case. It has acquired an insurance company on July, somewhere around July 1st 1945 and it asks the question as to how under those circumstances they could file consolidated returns.

The answer holds that if the corporation was to secure permission to change to a calendar year basis effective December 31st '45, and if the insurance company involved became a member of the affiliated group during the month of July, consolidated returns could be filed for the taxable period July 1st '45 to December 31st '45.

Q. Isn't it true that this problem involves only the acquisition of an insurance company subsidiary after the start of the parent's fiscal year?

A. This particular ruling was based on an insurance company acquired after the end of the parent's fiscal year.

Q. Is it also true that there is nothing whatsoever in the ruling relating to the mechanics of conforming accounting periods where the companies are already affiliated as was true in the ruling in Exhibit No. 1?

A. It set forth how consolidated returns could be filed, if they secured permission to change their accounting period. Maybe I didn't understand your question.

Q. Does the ruling set forth in the document offered here as Defendant's Exhibit No. 1 relate as to the question of whether and how taxpayers already affiliated might conceivably file an amended or file a consolidated return?

A. Already affiliated?

Q. Yes.

A. No; apparently this has to do with an affiliation with respect to an insurance company that was acquired after the fiscal year of the parent.

Q. Do you perceive any reasons why the difference in facts might be significant?

A. Between Exhibit 1 and Exhibit 2?

Q. Yes.

A. Exhibit 1 had to do with whether or not an insurance company could file on a fiscal year basis. The question here is how to file consolidated returns in connection with an insurance company acquired after the date of the fiscal year of the parent.

Mr. Rothe: The beginning date of the fiscal year?

The Witness: This, as I understand it—that they would acquire an insurance company between July 1st and July 30th. They acquired an amount of stock of the insurance company but it would be after, certainly after June 30th 1945.

By Mr. Davis:

Q. This would be after the beginning of the fiscal year of the parent in that case?

A. On or after.

Q. I believe you testified that this ruling appears in the Precedent File?

A. Yes.

Q. Is there anything to indicate why that ruling was selected for the Precedent File?

A. Nothing in the file other than in answer to the question: "Should the ruling be digested?", the answer is "Yes".

Q. That is all that appears?

A. That's all that appears, that is all that is indicated in the file as to why.



Q. Do you see any reason why it should have been digested. What would it add to the Precedent File that was not provided by the first ruling, in your opinion?

A. I don't know, but apparently the people at the time thought it was important enough to digest and also important enough to distribute to the field.

Q. If it were to be distributed to the field, would it be relied upon by the field people, presumably, in the disposition of other cases?

A. As I testified before, the distribution of these rulings to the field were, of course, not to be cited because of the violating of the rules of disclosure, but they were placed in the files of the various Internal Revenue Agents in Charge office by Revenue Agents having similar problems. This was the way they were utilized in the field.

Q. Would you take us through this file now in the same way that you did the file relating to Defendant's Exhibit No. 1, first the lefthand side.

A. On the left side of the folder is a similar document entitled "Ruling Publication and Distribution Memorandum".

The question: "Should ruling be digested?" The answer is "Yes".

"Should ruling be submitted for publication?" The answer is "No".

Reasons for nonpublication as follows: "Sufficiently covered by the regulation, relates to a proposed transaction, an if ruling based on an assumption".

"Should ruling be distributed?" There was an answer "No" put in there and then crossed out and answered, "Distribute" with the initials of the man who apparently had charge at that time of distribution. It's F.K.S., I believe, that was Fred Slanker at that time. He was in charge of the publication-distribution section, or whatever section it was.

Q. Is there anything else on that page?

A. Nothing but initials.

Q. All right.

Going to that particular file on the righthand side.

A. On the righthand side is a request for a ruling dated April 17, 1945 addressed to Deputy Commissioner of the Income Tax Unit—

Mr. Rothe: The same as Defendant's Exhibit 2-A?

Mr. Duncan: Is that the same as Defendant's Exhibit 2-A?

The Witness: That's the same as, yes, the same as Exhibit 2-A.

The next document is a copy of the ruling letter dated May 26, 1945 which is the same as Exhibit 2.

The next document is the digest for the subject file, would you like me to read that?

By Mr. Davis:

Q. Yes, please.

A. Here again, I am substituting "blank" for the name of the taxpayer.

Blank "and its subsidiary filed consolidated income and excess profits tax returns on the basis of a fiscal year ending June 30. It is proposed that "blank" will between July 1st and July 30th 1945 acquire sufficient stock in an insurance company which is taxable under Section 204 of the Internal Revenue Code, as amended, to qualify as a member of the affiliated group. The insurance company files returns on a calendar year basis as required by Section 29.204-1 of Regulations 111. Held, the insurance company would not be permitted to report its income on the basis of a fiscal year ending June 30th for the purpose of joining in the filing of a consolidated return. Held further, if "blank" "and its subsidiaries secure permission and change their accounting periods to a calendar year

basis effective December 31, 1945 and if the insurance company becomes a member of the affiliated group between July 1st and July 30th 1945, consolidated returns may be filed for the taxable period July 1st 1945 to December 31st 1945. The insurance company will be required to file a separate return for the period in 1945 with respect to which its income is not included in the consolidated returns."

I don't know whether, is this part of the file? (Consulting with counsel).

Mr. Duncan: I don't believe it is, but you can refer to it, if you will.

The Witness: In this file, whether or not it was part of this file originally, in this file is a mimeographed copy of the ruling dated May 26, '45 which is Exhibit 2. It's headed "Confidential Unpublished Ruling No. 1661".

By Mr. Davis:

Q. Mr. Swartz, referring to Defendant's Exhibit No. 2, the second page, thereon is contained a set of initials, various sets of initials. The first one in the lower left is an initial, set of initials E.C.H. 5/4/45, and on the right-hand side, far right are 5/26/45.

This would indicate that between these two dates various people examined this proposed ruling letter and presumably read it sufficiently to decide whether or not to affix their initials.

Would you describe just how that might have been accomplished?

A. Quite often—I don't know how it was accomplished particularly in this particular ruling. Quite often, insofar as the dates are concerned on the ruling, it may be that this issue had been discussed by the people who initialed, and where the issue may have been discussed with the people who initialed sometimes if a decision had been made in conference or as a result of a discussion, when

the final ruling is finally prepared and they recognize what the issue is as having been discussed the initials flow through pretty fast. I have no reason to believe this happened here, but sometimes this happens.

Q. Who would have prepared the original or the draft of the original, the person bearing the initials E.C.H.?

A. Yes, ordinarily the first initial is the author. This is not necessarily—this does not necessarily mean that he drafted originally the letter that was finally issued. It's possible that this letter may have been drafted before this May 4, '45 date. It may have gone through several initials and then somebody might have wanted some changes in this letter, at which time it may have been re-drafted by the originator in accordance with the suggested changes along the line, so this could really very well be the combined efforts of everyone here.

Q. How would the draft as prepared by the one who initiated the letter or who considered the request for ruling initially, how would it be communicated, transmitted from person to person among the people listed here?

A. I presume ordinarily by the regular routing at that time. In 1945, I am not too sure how those were handled. Sometimes, I presume, within the group it may have been handed to the next reviewer where they were on the same floor. In other cases, of course, it goes into the routine transmittal by messenger, where a messenger would pick it up and take it to the next office.

Q. Yes.

Now, you have indicated, I believe, that there was something about this exhibit 2, or suggested that it had been transmitted to the Office of the Chief Counsel for review; is that correct?

Mr. Duncan: I believe the testimony was with respect to Exhibit 4, but this may well have been too. I may be wrong on that.



By Mr. Davis:

Q. Is there anything to indicate, are the initials J.P.W. there indicative of a review by the Chief Counsel?

A. I would assume that the initials J.P.W. are the initials of Mr. Wenchel who at that time was Chief Counsel.

Q. Would a proposed ruling such as this have been delivered to Mr. Wenchel for his coordination without some communication of transmittal?

A. In those days I don't know what the procedure was. In some cases the ruling letter is merely, merely sent up with what was called a "buck slip" for their initials or disapproval. Not all of the submissions to the Chief Counsel are accompanied by a covering memorandum. Quite often the ruling letter is merely sent up there for approval.

Q. Are there any—to your knowledge, Mr. Swartz, are there any other files in your office relating to the issuance of this particular ruling letter, Exhibit No. 2, which is not in the file which is now in your hands?

A. In my office?

Q. In the office of the Assistant Commissioner, Technical?

A. Not that I know of. I don't know. I have the file here. This is all that is contained in this file and I am unaware of—

Q. Are there any auxiliary or related files bearing upon the issuance of this letter of ruling in the Internal Revenue Service?

A. There may be. There may be files in the Chief Counsel's Office, that I don't know.

Mr. Rothe: I think the record should show that just a moment ago Mr. Levine pointed to a file which was in front of him and indicated that file to Mr. Wilson.

Just let the record show that, please.

Mr. Duncan: We are not hiding the fact that there are other files.

Mr. Wilson: I have no objection.

Mr. Rothe: Just let the record it, that's all.

Mr. Duncan: But as far as Mr. Swartz' office goes, I think his testimony is clear. He has testified with respect to the files from his office.

By Mr. Davis:

Q. That there are no files in the office of Assistant Commissioner, Technical—

Mr. Duncan: In the custody of Assistant Commissioner, Technical's office, yes.

By Mr. Davis:

Q. To your knowledge, Mr. Swartz, are there files in the custody of any officer of the Internal Revenue Service or of the Treasury Department relating to the issuance of this ruling which are not included in what you have before you?

A. To my knowledge, I don't—I am unaware of files in any other office. I presume that ordinarily there might be a copy or something, I imagine, in the Chief Counsel's Office to record that they had reviewed this document. If there was any interoffice comment or anything like that, it might appear in the files of the Chief Counsel.

Q. If there was an interoffice comment, would that not have been addressed to you?

A. If it were—by interoffice I meant in the office of the Chief Counsel, not being communicated to me.

Q. I see.

Do you know or can you testify that there was no communication, no written communication addressed to you by the office of the Chief Counsel addressed to the Assistant Commissioner, or the Acting Commissioner in this case by the Office of Chief Counsel relative to the issuance of ruling designated as Exhibit No. 2?



A. I can answer it this way, that had there been a communication from the Chief Counsel to the Office of the Deputy Commissioner I presume it would be in this file with respect to this particular case.

Q. Do you know whether Mr. Levine made a search for any such files in the Office of Chief Counsel?

A. I do not know it of my own knowledge. He was to make a search of my office and any documents that we might have pertaining to this issue.

Q. Did he make it; to your knowledge, did he make a search beyond the files in your own office?

A. Not to my knowledge.

Q. Would I be correct in identifying the initials E.C.H. as being Mr. Heft, Earl Heft?

A. I think that's probably right, yes.

Mr. Rothe: H-e-f-t.

The Witness: H-e-f-t.

By Mr. Davis:

Q. What is the next item in the file?

Mr. Duncan: I think you have identified them all.

The Witness: This is all in this file.

By Mr. Davis:

Q. Thank you.

You referred to an index card that listed the issue in the ruling in Exhibit No. 2, and I believe you stated in the distribution in the field just what the issue was?

A. The document that went to the field is merely a copy of the ruling letter that was issued to the taxpayer, plus, in addition, at the bottom of the—following the ruling letter is a digest which, as far as I can see, is identical with the digest, however, just for the subject file.

Q. I see.

What is the document called from which you have just read?

A. This one?

Q. To which you have just referred rather.

A. The one that's circulated to the field?

Q. Yes.

A. I think I identified it as "Confidential Unpublished Ruling No. 1661".

Q. Would you describe generally what this classification of document entails?

A. The classification?

Q. What is covered by the term "Confidential Unpublished"?

A. A Confidential Unpublished Ruling is a document which is circulated to the field which is not to be cited by name as being—inasmuch as it contains the name of the taxpayer, that it is confidential to that extent and that the ruling contained therein has not been published, at least at the time the document was issued.

Q. You made reference to the problem of avoiding divulgence of the identity of the taxpayer. What do you know about the policy or the origin of the policy of Internal Revenue Service as set forth in the Internal Revenue Bulletin that no unpublished ruling will be relied upon in the disposition of any other case?

A. I was not—I did not participate in drafting that part of the Internal Revenue Bulletin—

Q. No.

A. —that states that.

Q. On what do you base your conclusion, then, that it is because of the identification problem in maintaining, or avoiding divulgence of any identification?

A. I base that on the fact that when I was a Revenue Agent in the field, in New York that these C.U.R.s, as we called them, Confidential Unpublished Rulings, were put in the files and available to the Revenue Agents to be used so long as they were not cited.

Q. Who told you that this was—

A. It was probably my group chief or the persons in the New York Office who broke me in as a Revenue Agent and told me where the files were located and what materials were available to us in order to conduct an examination.

Q. I see.

You, of course, are familiar with the provision in the Internal Revenue Bulletin, and I quote, "No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Bureau of Internal Revenue as a precedent in the disposition of other cases".

A. Yes, sir.

Q. And you think, or you have reason to believe that this statement is limited solely to maintenance of the identity, preservation of the identity of the taxpayer in the particular case?

A. I can answer that by saying how I was informed they were to be utilized, and that was we weren't to cite them. In other words, for purposes of our reports to, with respect to audits to taxpayers, we could cite only the law, the regulations or published rulings or supreme court cases. We were not to cite or to rely on those decisions for purposes of quoting or putting in statutory notices or the reasoning in our audit reports. However, they were in the open files and available to be utilized to look at the reasoning on the disposition of the issues, in order for us to dispose of the issues if they came before us. We did not, however, cite them, nor did we rely on them insofar as quoting them for purposes of the decision we made in connection with the auditing required, but they were helpful for reference purposes that that issue had been considered by the officers in Washington who had arrived at a policy decision and felt sufficient enough that this was important enough a decision to be circulated to the field,

but should not be cited nor should we rely on it for the purposes of quoting it in our—for example, we were instructed not to rely on paragraphs contained in material, in training material, for example. There was a good deal of training material, and we were not to rely on nor cite anything in disposing of our cases with respect to anything that was contained in the training material.

But we nevertheless used those for purposes of research in connection with trying to find a satisfactory answer to any question that arose in connection with an audited return.

Q. To the best of your knowledge, did any of these Exhibits 1 through 7 ever become available, were they ever delivered either in copy form or any other manner to any person outside the Internal Revenue Service, except the addressee?

Mr. Duncan: I'll object to that question, unless you limit it to delivery by representatives of the Internal Revenue Service. He can't have knowledge as to what a taxpayer might do with a ruling.

By Mr. Davis:

Q. Delivered by anyone of the Internal Revenue Service?

A. I have no knowledge, of course, that someone did not deliver, but the orders, of course, were, the rules are, of course, that they are not to be shown or delivered to anyone else other than the taxpayer.

Q. Would you refer to the file containing Exhibit No. 3.

A. This is Exhibit No. 3. Now, we have—as far as I know, we have been unable to locate this file, the file on this particular one.

Q. Do you know what search has been made for it?

A. The same search, I guess, that was made with respect to the others.

Q. Just what search was made, what has Mr. Levine told you as to what he did with respect to the location of this file?

A. Mr. Levine told me he exhausted all ways and means of locating all correspondence with respect to this particular issue.

Q. Do you know whether he made the search himself or whether he delegated it to someone else?

A. I do not know. I know that he said to me that he had found this or he had found that. I imagine that there was more than one person doing the search; I'm not sure, of my own knowledge I do not know.

Q. This is a ruling letter which you do not know for sure was in the Precedent File or was not in the Precedent File? It may or may not have been?

A. I don't believe this could have been in the Precedent File.

Q. Do you know where it was found?

A. I assume this may be one of the—I don't know for sure, but I assume this may be one of the letters from the files of one of the experts in the Corporation Branch, but I'm not sure. I assume it was.

Q. Is it possible that there may be files of former experts of the branch with rulings like this one?

A. Well, anything is possible. Ordinarily, though, when someone takes over the desk of that particular expert, it's because this particular expert is retiring or going to some other branch and the personal files or any files that happen to be on that particular subject are usually retained by the person taking over that particular desk.

Q. Do you know where Mr. Heft is now employed?

A. I understand Mr. Heft is employed by General Motors, the last I heard.

Q. Is this letter—I can't really make out whose initials are on it.

A. The initials up at the top are apparently E.C.H. Yes, that would be Earl Heft at the top of the letter.

Q. Where is he employed in General Motors? Do you know?

A. I don't know. I understand he's employed in the tax department somewhere. I understand he has something to do with preparing the returns or seeing that the returns are filed properly.

Q. Over the years from 1944 to the present time, how many people have been employed in the capacity which you would consider that of an expert in the field of consolidated returns?

A. We had some experts on consolidated returns that came into the division that weren't necessarily working on consolidated returns, but I understand between 1944—let's see, and the present time there have been about six people that have worked on this particular subject, in the Rulings Division or in the old Coordinating and Advisory.

Q. Would you name them?

A. As I understand it there was Earl Heft, Dan Ferris, Carey Ross, David Deutsch, Howard Bradley and Driscoll, a man by the name of Driscoll. (After consulting with aides) His name was Ray Driscoll.

Q. During your service in the Tax Rulings Division, did you consider yourself an expert in the field of consolidated returns?

A. No, I can't say that I considered myself an expert on consolidated returns. I had occasion, of course, to go into consolidated questions, but I wouldn't have considered myself what we call a specialist on consolidated returns.

Q. Referring to Exhibit 4, before we go into Exhibit 4, Mr. Swartz, how do you explain the inability to locate the file relating to Exhibit 3? What do you think?

A. I have no explanation.

Q. Is this a frequent occurrence?



A. No, It isn't. Normally, if we have the name of the taxpayer, we can locate the file.

Q. If you do not have the name of the taxpayer and if the ruling has not been indexed in connection with the Precedent File process, then how would you locate a ruling relating to a given subject matter?

A. Which is not in the Precedent File?

Q. Yes.

A. That would have to be done in the general files under a broad index.

Q. What is the—

A. I think the broad index here would be "Consolidated Returns".

Q. There is no finer breakdown beyond that in the general file, "Consolidated Returns"?

A. As far as I know.

Q. Do you have any idea how many rulings have been issued since 1944 relating to Consolidated Returns?

A. I have no idea of the number, I don't think we have any breakdown on the number. There is a considerable number of rulings that have been issued in the consolidated area since 1944.

Q. Do you know whether all of those files were reviewed by Mr. Levine?

A. Oh, I think it would have been physically impossible for all of the material in all of those files to be physically reviewed. I have no knowledge that Mr. Levine didn't go through all those file, but it is quite a number dealing with all areas of consolidated returns.

Q. In order to make sure, though, that there were no other rulings issued than the ones set forth as Exhibits, 1 through 7 inclusive, it would be necessary to go through all of the consolidated returns files.

A. I presume, to make sure. On the other hand, as I say, the specialists kept copies of all of the rulings that are issued in our particular field and therefore it would not be too probable that there were any rulings that wouldn't be in the files and maintained by the files of the experts, although I couldn't say that not one of them got lost.

Q. Do you know who presently has the files that were in the custody of Mr. Heft when he was a specialist here in the service?

A. No, I do not, the particular individual that would have those files. You mean his personal files?

Q. His personal specialist files?

A. He was at one time Chief of the Branch and had custody of the corporation files, I mean, as such.

Q. No, I meant you referred to the fact that each specialist developed his own file and I was just wondering if you knew who had his files and how the custody was transferred?

A. No, I really don't know. I would assume that probably Mr. Bradley, Mr. Driscoll or Mr. Deutsch might have them. They are the ones, the last ones who worked on these.

Mr. Duncan: Off the record for a minute.

(Discussion off the record.)

Mr. Duncan: Back on the record.

By Mr. Davis:

Q. Now, to Exhibit 4, Mr. Swartz. Would you take us through that file, please?

A. Yes. On the lefthand side of the folder again is a document entitled "Ruling Publication and Distribution Memorandum". The question asked: "Should this ruling be digested?" The Answer is "Yes". The answer to the question "Should ruling be submitted for publication?" is "No". The reasons for nonpublication are as follows: "Partly covered by citations listed above; relates

to a proposed transaction; in part an 'if' ruling; changes in accounting are not ordinarily subject" of application for publication—well it doesn't say application, "of publication."

In answer to the question "Should ruling be distributed?" the answer is "No". If not distributed state reasons "See above reasons, except last; compare CUR 1661, which has been referred to before"—I don't know what that word is.

Mr. Duncan: Slight variation.

The Witness: (Continuing) "the slight variation of facts from CUR 1661 not sufficient to require distribution." "Principle is the same."

On the righthand side of the folder—

By Mr. Davis:

Q. Before you go on, would you refer to the citations which are the basis for the decision against publication?

A. "Partly covered by citations listed above" on this document are citations with respect to the sections of the regulations involved. In this particular document it refers to Section 29.204-1 of Regulations 111, Section 23.13 -G and 23.14 and 23.32 of Regulations 104, Sections 33.14 and 33.32 of Regulations 110.

I might say there is another question here that is answered in this document. It says: "Does ruling modify or revoke any published rulings or CURs?" and the answer is "No".

Q. To you perceive any difference yourself as you have read this ruling, as I understand, between this one and the CUR?

A. No, this ruling and the ruling of May 26, 1945?

Q. Yes, that's the CUR.

A. This is the one that we were—in which the insurance company was acquired after the end of the fiscal year of the parent—

Mr. Duncan: After?

The Witness: We're talking about Exhibit 4?

Mr. Duncan: Yes.

Mr. Davis: Yes, Exhibit 4.

Mr. Duncan: As compared to Exhibit 2?

Mr. Davis: Yes.

Mr. Duncan: Take your time, Mr. Swartz, and read the difference.

The Witness: In the Exhibit No. 2—oh, Exhibit No. 2, the insurance company was apparently acquired after the end of the fiscal year of the parent, while in Exhibit No. 4 the insurance company was acquired before the end of the fiscal year of the parent.

By Mr. Davis:

Q. Now, reference was made to Exhibit 4-B—excuse me, this is probably going to be shorter to go through the file in your usual way.

A. All right.

Q. There is nothing else on the left side of the file?

A. Nothing else on the left side. Well, there is a card here. This is apparently just a card that is made out in connection with this other document as to whether or not this should be filed or should be made—put in a subject file.

There is a checkmark relating to issue, "no ruling thereon in the subject file" and it's checked and signed by E. C. Heft, the writer of the document.

Q. Would you repeat that? Do I understand that this writer, the writer of this card says there is no ruling thereon in the subject file?

A. Apparently with respect to the question as to whether this should be sent to the subject file or digested, the document here, which has various checkmarks on it; whether it distinguishes, modifies, revokes, affirms.

Q. What do those checks show?

A. There is nothing marked in that, in those checkmarks. This is apparently an information document with respect to the attached ruling as to whether it is recommended for inclusion in the subject file for the reasons that, and then: "interprets, distinguishes, modifies, revokes, or affirms". There is no checkmark in there.

Then it goes on to say, apparently, what does it distinguish or interpret, a published ruling, a distributed ruling, CUR, or another ruling in the subject file? And it says, "Relates to a new issue, no ruling thereon in subject file".

Mr. Duncan: Perhaps you ought to state for the record that that particular statement is checked.

The Witness: Yes.

Mr. Duncan: And who is the document signed by?

The Witness: It's signed by E. C. Heft, and approved by his reviewer, Mr. Olmstead.

By Mr. Davis:

Q. Is there anything to show why?

A. No, there's nothing on here except a checkmark in that one box and the two signatures.

Q. Did Mr. Heft prepare the preceding page, or is that apparent?

A. Apparently not. The initials here are M.M.S., approved by E.B.P.

Q. How do you reconcile, isn't there an apparent divergence between the documents, these two documents?

A. I don't know which of them was—let me see. Oh, the one—oh, I see here it is. This first document was prepared by the writer, Earl Heft, of this ruling and is dated 2/18/47.

The next document apparently was prepared by the digest people and is dated 2/27/47. I gather the first is the recommendation, earlier recommendation by Mr. Heft, and the second is the decision made by the publication and distribution people.

Q. Mr. Heft, as I understand, is one of the six specialists in this field; is that correct?

A. I think he was in 1947.

Q. Had he in fact been the one who apparently initiated Exhibits 2 and 3?

A. 2 and 3? Apparently so, his initials appear at the top, which ordinarily indicates that he initiated the rulings.

Q. You have testified that on the basis of your analysis here you discern only one difference between the ruling issued as Exhibit 4 and the ruling issued as Exhibit 2, isn't that correct?

A. I said that was one difference; I don't know that it was the only difference. This was a difference in the factual situation.

Q. Is there any other difference?

Mr. Duncan: Take your time, Mr. Swartz. Look through the exhibits.

The Witness: This is 2 and 4. (Examining documents) Of course, in Exhibit 4, our ruling permits the filing of two consolidated returns in order to get the parent and subsidiary on a basis so the consolidated returns can be filed. By Mr. Davis:

Q. Whereas, Exhibit 2 only requires—actually, weren't there two consolidated returns filed?

A. Yes, yes; under 4, two consolidated.

Mr. Duncan: Exhibit 4.

The Witness: Exhibit 4.

By Mr. Davis:

Q. Not in 2?

A. Apparently in 2 there was one consolidated return period.

Q. You made reference to this confidential unpublished directive and then said that: "previously referred to". Was that "previously referred to" in the file or is that just your reference to our prior discussion of it here?



A. This is referred to in the file.

Mr. Duncan: Would you identify it.

Mr. Rothe: Would you read that into the record?

Mr. Duncan: He read it into the record before.

The Witness: Yes, in Exhibit No. 4, the document "Ruling Publication and Memorandum" under the question: "Should ruling be distributed?" the answer is "No", and under "If not, state reasons" it says, and I'll read it again: "See above reasons, except last; compare CUR 1661 . . ."

Mr. Duncan: Go ahead and read the rest of it, if you will.

The Witness: "The slight variation of facts from CUR 1661 not sufficient to require distribution. Principle is the same."

By Mr. Davis:

Q. All right, now, since Mr. Heft was the specialist at this time in the field, as I understand it; that is correct, isn't it?

A. He was one of them, as I understand it.

Q. And since he had initiated the ruling issued as Exhibit No. 2, how do you account for the fact that his opinion apparently was in disagreement with that of the publications or the Precedent people?

Mr. Duncan: Disagreement as to what? As to whether it should be distributed or it should be published or what?

Mr. Davis: I believe that there is a checkmark on the second document.

By Mr. Davis:

Q. What does that checkmark show?

A. On the document signed by Mr. Heft on February 18, 1947, apparently this relates to whether or not this should be included in the subject file. His reason for apparently saying it should be included in the subject file

is that it relates to a new issue and no ruling thereon in subject file.

Now, in the other document—

Mr. Duncan: Does the other document deal with the subject file?

The Witness: It says "Should ruling be digested", "Yes", which goes into the subject file. "Should ruling be submitted for publication?", "No"; "Should ruling be distributed?", "No", because the CUR was distributed. It was digested, it was digested.

By Mr. Davis:

Q. I see. Why do you think that Mr. Heft thought that this was a new issue?

Mr. Duncan: If you know.

The Witness: I don't know.

By Mr. Davis:

Q. Would you begin on the right side of the file?

A. I'd be glad to.

On the righthand side of the folder is a request for a ruling addressed to the Commissioner of Internal Revenue and dated September 25, 1946.

Mr. Duncan: Would you identify that as Defendant's Exhibit 4-A?

The Witness: It is Defendant's Exhibit 4-A.

The second document appearing in this folder is Defendant's Exhibit 4-B, and is a ruling letter to a taxpayer dated October 10, 1946, signed by the Deputy Commissioner of the Income Tax Unit.

The next document is Defendant's Exhibit 4-C and is a letter from taxpayer's representative to the Commissioner of Internal Revenue with respect to a reconsideration of their letter of September 25, 1946.

The next document is a memorandum dated October 30, 1946 and is a memorandum to the Chief Counsel from the Deputy Commissioner of the Income Tax Unit.

By Mr. Davis:

Q. What is the nature of this Communication?

A. This is a communication submitting to the Chief Counsel the proposed ruling letter, at that time being proposed, in which it was proposed to modify the ruling letter dated October 10, 1946, which is Defendant's Exhibit 4-B, with respect to the procedure to be followed by this taxpayer and its subsidiaries in making its returns for the current year, and is transmitted to the Chief Counsel for consideration and recommendation as to proposed action contained therein.

It is called to the attention of the Chief Counsel as the case is somewhat different from that upon which CUR 1661 was based, and the question that is raised is as to whether the parent company by reason of such acquisition and notwithstanding the fact that it will comply with provisions of the regulations as it was applied in CUR 1661 with respect to adopting an accounting period for 1946 to conform with the accounting period of the insurance company would be precluded from filing a consolidated return for the fiscal year ending September 30, 1946.

The next document is Defendant's Exhibit 4, which is the ruling to the taxpayer dated February 5, 1947, and does contain the initials of the Chief Counsel's office, the Technical Advisor to the Commissioner and is signed by the Commissioner.

The next document is a digest for the subject file of this ruling. I will read this substituting blanks for the name of the taxpayer:

Blank "and its subsidiaries file consolidated income and excess profits tax returns on the basis of a fiscal year end-

ing September 30th. The affiliated group acquired complete ownership of" blank "insurance company as of July 1, 1946. The insurance company files its returns on the calendar year basis, as required by Section 29.204-1 of Regulations 111. Held, for the purpose of filing consolidated returns, the parent corporation and its other subsidiaries will be required to adopt a calendar year accounting period in conformity with that of the insurance company. Held further, if the parent corporation and its subsidiaries change to a calendar year basis of accounting, effective December 31, 1946, consolidated income and excess profit tax returns may be filed for the fiscal year ending September 30, 1946, including the income of" blank "insurance company for the period July 1, 1946 to September 30, 1946 and a consolidated income tax return may be filed for the period October 1, 1946 to December 31, 1946 including the income of the insurance company for such period. Held further, the insurance company will be required to file a separate income tax return for the period January 1, 1946 to June 30, 1946."

It goes on to state that the ruling of October 10, 1946, which is Government's Exhibit 4-B, modifies it. That's all that's contained in this.

Q. And the ruling of October 10, 1946 has not been submitted to the Chief Counsel for review?

A. The ruling of October 10, 1946, no. Apparently it had not been, according to the file it was signed by the Deputy Commissioner of the Income Tax Unit and at least is not initialed by the Chief Counsel.

Q. Why was he asked to review the proposed modification issued as Exhibit 4?

A. I presume, in accordance with the transmittal to the Chief Counsel, I think, the reason the Deputy Commissioner submitted this to the Chief Counsel for an interpretation

is that under a strict interpretation of the regulations the denial of the right to file a consolidated return for the year requested would be justified but in view of the circumstances in this case and the apparent desire of the companies involved to fulfill the requirements of the regulations with respect to filing consolidated returns, it is believed the granting of such right would not jeopardize the government's interest and that from an administrative standpoint the proposed ruling is sound.

Apparently they were trying to see whether the Chief Counsel agreed legally with the administrative position proposed to be taken by the Commissioner.

Q. The file does not show the reply or the General Counsel's memorandum on this point?

A. There was apparently no General Counsel's memorandum submitted to the Deputy Commissioner, which quite often occurs; if they agree with the position, they merely initial the document, and this shows the initialing of the document by the Chief Counsel. Whether there were any internal memoranda within the Chief Counsel's Office, I don't know.

Q. How long is this memorandum of transmittal?

A. Of transmittal to the—

Q. To the Counsel.

A. From the Deputy Commissioner to the Chief Counsel?

Q. Yes.

A. Three paragraphs on one page, but it included the ruling letter which finally went out.

Q. Yes. I am wondering if you would, so that I can have that in focus, because this, I think, is a very significant document for us; would you mind reading those three paragraphs?

Mr. Duncan: Suppose we have a copy of it made, perhaps, and have it excised?

Mr. Rothe: That's all right.

Mr. Duncan: Let me look at it, here. (Examining document) Although I fail to see the relevance of this.

The problem here, Mr. Davis, is that this is an inter-office communication between the government and I believe Mr. Swartz has fairly summarized it. I don't think it is in the government's interest, as a precedent, to turn this over to you now.

We would think about it and have a copy made. He summarized the contents of it, but the actual turnover of the document itself, I think, we will resist at this time.

Mr. Rothe: How about reading the pertinent paragraphs?

Mr. Wilson: There are three in number.

Mr. Duncan: Three in number. He summarized them, in a fair and broad manner. He was quoting practically from some of them when he was reading them.

By Mr. Davis:

Q. It was because they seemed to be particularly relevant that we thought that they might be read in continuity here.

Mr. Duncan: I think he summarized them fairly, and that's the situation.

Mr. Rothe: Not that we doubt your judgment, Mr. Duncan.

Mr. Duncan: This is an interoffice, legal memorandum of the government with respect to what we will do. What we did do is in evidence, subject to your objection, and I think what we did do was the relevant consideration and not the reasons why we did it.

Mr. Davis: That's a profound statement.



By Mr. Davis:

Q. Is it apparent from the file at what time Dr. Heft's comment on the second document on the lefthand side of the file was made? Was it at the time of the original ruling?

Mr. Duncan: If that document is dated.

By Mr. Davis:

Q. What is the date of Mr. Heft's signature?

A. February 18, 1947.

Q. Thank you.

A. The date of the letter was February 5, 1947.

Q. How about the digest?

A. February 27, 1947. Well, February 27, 1947 on the M.M.S. initials and March 4, 1947 approved by E.B.P.

Q. The document marked Defendant's Exhibit 4-C refers to a conference held Monday, October 14, presumably October 14, 1946, between several representatives of the Bureau of Internal Revenue and representatives of the Tax Bureau. Is there anything in the files of the Internal Revenue Service which summarizes the people who participated at that conference, and what was discussed?

A. There is nothing in this file so far as I know about or relating to that conference, no, sir.

Q. Do you know of anything in any other file of the Internal Revenue Service?

A. I know nothing, no, sir.

Q. Referring now to Exhibits 2, 3, and 4, Mr. Swartz, is it not true that each one of them relates to the filing of a consolidated return with respect to the affiliation during the taxable year of an insurance company subsidiary with a parent on a fiscal year?

Mr. Duncan: You'd better read that question.

Mr. Davis: Strike the question and let me rephrase it.

By Mr. Davis:

Q. Do not the documents marked Exhibits 2, 3, and 4 deal with the filing of a consolidated return in a situation in which there has been a newly acquired subsidiary, an insurance company subsidiary on a calendar year by a parent on a fiscal year?

A. In each case the parent was on a fiscal year and so far as the insurance company was concerned, I'll have to check. (perusing documents)

Mr. Duncan: What was the other common denominator that you wished, Mr. Davis, for Mr. Swartz to cite in each case?

The Witness: In each case, the parent corporation is on a fiscal year basis and in each case the insurance company was on a calendar year basis.

By Mr. Davis:

Q. I see, but each of these cases deals with the acquisition, prospective acquisition of an insurance company subsidiary by a parent on the fiscal year; isn't that correct?

A. Yes, they have involved cases in which the parent acquired an insurance company.

Q. Is there any ruling, prior to December 31, 1950, to your knowledge issued by the Internal Revenue Service prior to that date which related to the filing of a consolidated return by a fiscal year parent and a calendar year insurance company subsidiary, other than Exhibit 1?

A. Before 1950?

Q. Yes, where they were already affiliated.

A. Apparently not.

Q. The same answer would apply if the date were extended to January 31, 1951?

A. Yes, I think the same answer would apply.

Q. In fact, the same answer would apply up until August 21, 1951?

Mr. Duncan: You're referring to Exhibit 5?

Mr. Davis: Yes.

The Witness: That was dated August 21, Exhibit 5 was dated August 21, 1951. The answer is yes.

By Mr. Davis:

Q. Thank you.

A. I would like to point out that in our Exhibit 5 in our ruling dated August 21, 1951, that on page 2 in the last paragraph on that page the Commissioner says: "it has been the policy of the Bureau in cases of this kind to permit the filing of the first consolidated return of an affiliated group upon the basis of the fiscal year of the common parent corporation".

Q. Do you know what the source of that statement is?

A. No.

Q. Is there any authority for it in any—

A. I was merely quoting from the Commissioner's letter in which he states that it has been the policy of the Bureau in cases of this kind to permit the filing of the first consolidated return.

Q. Suppose we go through this file then of Exhibit 5.

A. Beginning at the—

Q. Is there anything on the left side?

A. Nothing on the left side of the file. This is the entire file I have here.

The first document is a request for a ruling dated, the first item in the file is Defendant's Exhibit 5-B and is a request for a ruling addressed to the Commissioner of Internal Revenue from a taxpayer's representative, including the attachment which is also a part of Exhibit 5-B dated June 29, 1951.

The next item is a letter dated July 25, 1951, which is Defendant's Exhibit 5-A and addressed to the Commissioner of Internal Revenue and signed by the taxpayer's representative.

The next document is a copy of Defendant's Exhibit 5 dated August 21, 1951, which is a copy of a ruling to the taxpayer and signed by John B. Dunlap, Commissioner of Internal Revenue.

The next document is another carbon copy of that same ruling.

The next document is a carbon copy of that same ruling, but is the initialed copy.

Q. Why is it that we do not have the initials shown on the Defendant's Exhibit 5, whereas we do have the initials on the other?

Mr. Duncan: I'll state for the record why that is. I don't think Mr. Swartz would know. The reason is that written across the bottom is a reference to the name of the taxpayer which is so intermingled with the initials that I had to, in order to cut out the names I had to cut out a bunch of initials. However, I have no objection to Mr. Swartz referring to the initials, he can read them out for you for the record, and the name of the taxpayer is referred to with regard to a prior ruling. He might refer to that too.

Mr. Rothe: A what?

Mr. Duncan: A prior ruling, a CUR on another ruling. In other words, this is so intertwined with the ruling and the reference to the CUR on the prior ruling.

The Witness: At the bottom of the initialed copy of the ruling dated August 21, 1951 is a reference to CUR 1661, and also the name of the taxpayer of another—

Mr. Rothe: How does the reference read?

The Witness: It just says it, that's all.

Mr. Rothe: Does it say area involved or something like that?

The Witness: It just says, down here in ink, above the initials, together with the initials is CUR 1661—5/26/45.

Mr. Duncan: There is also another reference.

The Witness: There is another reference which is the name of the taxpayer, the name of the taxpayer being the taxpayer involved in Defendant's Exhibit 4.

Mr. Duncan: And there is the date.

The Witness: And the date, February 5, 1947.

By Mr. Davis:

Q. What would have been the occasion for making these references do you think?

A. It could have been with respect to whether or not this should be distributed or made into another CUR.

Mr. Duncan: Could you read some of the initials for Mr. Davis, who initialed them across the bottom?

The Witness: Yes, the initials are ECH, which apparently is Earl Heft; CPS, who I believe—

By Mr. Davis:

Q. Could you give the dates?

A. 8/14/51. CPS, 8/14/51, with the initial below that F, which apparently is Dan Ferris initialing for Charles Susman, who was then, I believe, Chief of the Branch. There is CNT, who is, I believe, Clarence Thurston, who was Technical Advisor to the Deputy Commissioner. There is FTE—

Mr. Rothe: Is there a date there?

The Witness: 8/17/51. There is FTE, who is Frank Eddingfield, who was a senior Technical Advisor to the Deputy Commissioner, and there is a further initial—

Mr. Rothe: Date?

The Witness: 8/20/51. There is the initial EIM with the initial E below it which indicates that Mr. Eddingfield

initialed for Mr. McLarney, the Deputy Commissioner, on 8/20/51. There is the initial LS which apparently is Leo Spear, who was the Technical Advisor to the Commissioner, 8/20/51. There is another initial JC without any date. I think that—I don't recall the man's name but I think this was another man in—I'm just not sure what initial that is, but it appears to be JC. After that FM, 8/21/51, and that apparently is Fred Martin, who was the Assistant Commissioner, I don't know whether he was designated Technical at that time or not, but they had two assistant commissioners and Mr. Martin was an Assistant Commissioner.

Also in the file—

By Mr. Davis:

Q. Is there anything to show the referral of this review by the Chief Counsel?

A. Nothing in here that indicates that this was sent to the Chief Counsel, no.

There is a document attached to this file which is called "Subject File Recommendation". Again, this apparently is a—whether or not this should be recommended for inclusion in the subject file, with respect to whether it should be included in that it interprets, distinguishes, modifies, revokes or affirms. None of those boxes are checked.

It says: "Or a distributed ruling", written in ink, apparently by Earl Heft, is CUR No. 1661, dated 5/26/45, and it goes on to say or another ruling in the subject file, and it refers there also to the taxpayer's name which is the taxpayer to which Defendant's Exhibit 4 was issued, dated February 5, 1947, and it is signed by Earl C. Heft on 8/14/51 and is approved by the reviewer, DF, who apparently was Dan Ferris, on 8/14/51.

That is all that is in this file.

Mr. Rothe: I am not sure I get the significance of the inked in material by Earl Heft. What does it refer to?



The Witness: The subject file recommendation is printed out and all that the reviewer needs to do is check a box or write in his recommendations. With respect to the different material which says, it is recommended for inclusion in the subject file for the reasons that it is a distributed ruling and he says—he writes in after that, see CUR No. 1661 dated 5/26/45, and under the printed heading another ruling in subject file, it refers to the taxpayer's name to which the February 5, 1947 letter was addressed.

Mr. Rothe: Is he saying there—is he checking a box of any kind?

The Witness: He has not checked a box.

By Mr. Davis:

Q. What question is he answering?

Mr. Rothe: What question is he answering by this material?

The Witness: Apparently since he hasn't checked the box which says it is recommended for inclusion in the subject file, because it interprets, distinguishes, modifies, revokes or affirms, since he hasn't checked that, then apparently this is just a notation with respect to the material that is in there, in the file.

Mr. Rothe: Consequently there was no recommendation that this be placed in the Precedent File, and it was not so placed?

The Witness: This is not from the Precedent File.

By Mr. Davis:

Q. Now, as I recall, Mr. Swartz, this is a ruling letter which was found after your affidavit was executed; is that right?

A. Of that I'm not sure.

Mr. Rothe: It has been so stipulated.

Mr. Duncan: It was stipulated that it was.

By Mr. Davis:

Q. Do you see any support in the prior rulings letters that in your opinion—what is the support, if any, in prior ruling letters—

Mr. Duncan: I think I'll object to that; the rulings speak for themselves.

By Mr. Davis:

Q. Do you have any explanation for the source of the statement in the last paragraph of page 2 of Exhibit 5 to which you referred?

A. I assume that the writer of this document, particularly since he referred to the CUR in the other case, that it was his—

Mr. Duncan: By "the other case", do you mean the ruling—

The Witness: I mean the ruling dated February 5, 1947, which is Exhibit 4 and which was referred to by Mr. Heft in the document in this file.

(Continuing) That he must have assumed that a practice or policy or position had been established which applied to this particular situation.

By Mr. Davis:

Q. This is an assumption?

A. I did not ask Mr. Heft at the time, no.

Q. I believe this is our first file—

Mr. Duncan: Could we have a break here, Mr. Swartz has been testifying steadily for two and a half hours and I think it might be appreciated if we could have a short break.

(Recess.)

By Mr. Davis:

Q. I believe you mentioned that this was a file which was not in the Precedent File, Exhibit No. 5?

A. Exhibit 5.

Q. Would you describe how that file is indexed and marked so that it could be located?

A. It is marked not only under the name of the taxpayer, but it also has typed up in the upper righthand corner of the document "Consolidated Return".

Q. Are there any numbers?

A. No.

Q. Or other identification?

A. No, no numbers.

Q. Is there a tab on the file?

A. There's a tab on the file, but I don't think that this is the tab that was on the file when it was pulled out of the file.

Q. This is not the file?

A. This is the file (indicating). I don't know whether it was in a folder or whether it wasn't. This is a new folder, apparently that it was placed in.

Mr. Rothe: May the record show that the witness when referring to the file was referring to a sheaf of 8 by 11 papers stapled together.

Mr. Duncan: With a loose tab on the front which he referred to.

Mr. Rothe: With a loose half sheet or half cardboard.

Mr. Duncan: Yes, with the subject.

By Mr. Davis:

Q. Referring to Exhibit 6, would you take us through that file, please?

Mr. Duncan: I understand by this, you are waiving your objections as to relevancy here.

Mr. Rothe: Not one bit.

The Witness: Starting with the bottom part of this file, there are an original and three copies—or original and two copies of the contingent fee statement signed by the taxpayer representative.

By Mr. Davis:

Q. What date?

A. There is no date. It's recorded on May 8, 1953, in the Power of Attorney Section.

There is an original and two copies of power of attorney from the taxpayer to a representative which was recorded on May 6, or, maybe—I can't tell, it's blurred. It's either May 6 or May 8, 1953. I don't particularly know why this is, but there is another original and two copies of contingent fee statement, and then another original and two copies of the power of attorney, the same dates.

Then there are two copies of a request for ruling dated, which are the same as Defendant's Exhibit 6-A, which is a request for a ruling addressed to the Commissioner of Internal Revenue, signed by the taxpayer's representative.

There is a copy of a letter dated May 7, 1953 to the taxpayer's representative signed by the head of the Technical Rulings Division, referring to the request for ruling dated May 4, 1953 in which it states that a request for conference has been arranged for two p.m. May 11, 1953. There are eight copies of that.

There is a letter, ruling letter dated May 22, 1953 to the taxpayer's representative which is the same as Defendant's Exhibit 6, signed by the head of the Technical Rulings Division, besides the Commissioner and by the head of the Rulings Division. There are then three more copies of that ruling and attached—

Mr. Duncan: That's not really part of the file.

The Witness: No, it isn't part of the file.

Mr. Duncan: That's not part of the ruling file. I have no objection to your referring to it, but it isn't covered by the question.

The Witness: That constitutes the file.

By Mr. Davis:

Q. Do you know where this file was located?

A. I presume this file was located in Miss Benesh's file, is that right? The indication on here indicates that this was a folder that was taken from the file of Miss Benesh.

Q. Who is Miss Benesh, for the record?

A. Miss Benesh is in the—oh, she apparently had it for some reason. Miss Benesh is in the Tax Rulings Division and this was gotten for her but is or was apparently in our general files under the title of "Consolidated Returns".

Q. Although the ruling is signed in your name and do I understand that it was signed for you by someone else; is that right?

A. Ordinarily—I am not so sure what in effect in '53. Under our present procedure, had I signed it, I would have initialed it. Under some procedures the signer did not initial. I can't really say whether I signed this or whether I didn't. It's quite possible that Mr. Thurston, Mr. Thurston who is Technical Advisor to the Technical Rulings Division, at that time had authority to sign my name. I can't really say whether I signed this or whether Mr. Thurston signed it.

Q. This apparently was never considered for digesting or for publication; is that correct?

A. Apparently not, there is nothing in the file to indicate that this was.

Q. Why would that be, that certainly rulings are apparently considered by publication?

A. Well, let's see. In '53, I think it was not until 1954 that we had a system of referring matters for publication. In other words, in '54, we entered into our publication—I may be wrong. I'm trying to think of the year in which

we started our publication policy. Anyway, there is nothing to indicate here that this was or was not considered. In any event, there is nothing in the file to indicate that it was referred for publication or referred to the digest file.

It was placed in the general files under the heading "Consolidated Returns".

Mr. Rothe: In case it might refresh your recollection, Mr. Swartz, I believe your change of publication policy was announced in Revenue Ruling 2, which was in the 1953, one, accumulative bulletin, page 484. Does that refresh your collection as to when?

The Witness: Do you know what weekly bulletin it was in?

Mr. Rothe: That I don't have.

By Mr. Davis:

Q. It must have been early because, bearing the number 2—

A. It was early, when we decided, that was the first ruling to announce our publication, but it wasn't necessarily in January. It was one of the first announcements. It could have been later on.

Mr. Rothe: It had to be within the first six months because it was dash one.

The Witness: It would have to be within the first six months.

Mr. Rothe: And it is page 484 of that.

By Mr. Davis:

Q. The paging has no relevance.

Mr. Rothe: That's true; it's rearranged afterwards.

Mr. Duncan: Is there a question pending?

By Mr. Davis:

Q. Referring to Exhibit 7, would you identify the papers in that file? What appears in the pages on the left side?



A. On the left side is—the first document appearing on the left side of the file is a document printed, a printed document which has certain questions which is entitled “Ruling Publication Memorandum”. This form is to be completed for each communication considered for purposes of publication by the Bulletin Branch.

It gives the taxpayer’s name, the address, the date of the Ruling, January 18, 1956.

Mr. Duncan: Give them the questions and answers.

The Witness: Question number two: “Is ruling covered by law, regulations, public rulings or decision?” The answer is “No”, the answer being put in by the ruling analyst.

“Does ruling modify or revoke a principle of any published ruling?” and the answer is “No”.

“Does ruling affirm, modify or revoke a principle of a CUR or AM?” “No.”

“Should ruling be published as a Revenue Ruling?” “Yes”. “If answer to 5 is no, should ruling be digested?” And the answer is “No”, with the initials J.S.D.

The next document is index classifications of rulings for the Research Facilities Section. This, again, is a mimeographed or printed document which requires certain information to be added, the section of law involved or regulation, put in in pencil “Section 1502, Internal Revenue Code of 1954”. And for index classification “Section 1502, Regulations Consolidated Returns, Section 831, Tax on Insurance Companies, and Section 204, Tax on Insurance Companies and Consolidated Returns and Change in Accounting Period, with the initials J.S.D.

Q. What is the purpose of this document, this last one?

A. Apparently this is the document to index this ruling in order for it to be placed in the Research Facilities files.

Now the Research Facilities File Section was a new, somewhat new section as a result of the reorganization of the Service. The filing of rulings was centralized in one place in Technical, since under the reorganization the Tax Rulings Division undertook also to rule in areas other than income tax. The files of other taxes were combined in the Research Facilities Section.

Q. This was taking over the so-called Precedent Files?

A. Precedent Files and the files of other Deputy Commissioners, apparently including estate, gift, excise and so forth, combining them under one file, and the purpose of this is to classify this particular file under an index.

The next document is apparently a proposed—well, let’s see. It’s a mimeographed memorandum which is used by the Bulletin Branch, the Bulletin Branch being a new branch under the reorganization, also, which undertakes to prepare and publish rulings in the Internal Revenue Bulletin.

This is a mimeographed memorandum to the Chief Counsel which they used to transmit proposed revenue rulings to the Chief Counsel for their review, signed by the Chief of the Bulletin Branch.

There is a mark across it so I can’t tell at this time whether or not it was decided not to send it, or what. Maybe the file will show that further on.

The next one is another document prepared in the Bulletin Branch merely to record and highlight or to record rulings recommended for publication. Section of the law involved, a proposed highlight entry, if it is published, the highlight to appear on the covers of the Internal Revenue Bulletin, and the entries in the index file that are to be made. There again it’s indexed under “Income Tax Accounting Period, Affiliated Group, Including an Insurance Company, Consolidated Returns” and also under

"Returns" under "Consolidated and Affiliated Group, Including Insurance Companies" and under "Accounting Period".

Q. What use was made of that and to whom was it addressed?

A. This is just a form for the use of the Bulletin Section or the Bulletin Branch in connection with the preparation of review and approval of editorials to appear with material to be published in the Internal Revenue Bulletin.

Q. Is there any indication to whom it went? Did it go outside the Bulletin Branch?

A. No, I think it just follows the file for purposes of—when they get ready to publish the ruling, that this—and when they get ready to file the material that is filed under these index entries and that the highlight entry would probably be used for the highlights occurring on the front page of the Bulletin.

The next document is again a printed form which is headed "Ruling Publication Memorandum" and this gives a considerable amount of material with respect to the research that needs to be done. In other words, this was a document that was used by the Bulletin Branch in taking a Revenue ruling, researching it to see whether or not it modified any other published rulings, revoked any other published rulings, the section of law involved.

Q. Could you read what it says there?

A. Yes, I was explaining.

Q. Excuse me.

A. Then it also goes on to cover the action to be taken. There is a block as to whether to publish or whether not to publish, and these are all in boxes in this form, so that it gives the name of the taxpayer, the date, symbols, the ruling, section of law involved.

It says: "8/31, 1502, Section of the Regulations involved 1.1502-14". Apparently in researching this, they also look

at tax services to see whether or not there is any mention made in tax services of this item. The material here is recorded as 594 CCH paragraph 4903 and 593 CCH paragraph 4053. I really don't know what that means.

Then it has regulations paragraph 1.1502-14-C. The next question is: "Pertinent court decisions", "None". "Section, tickler file". "Cite related cases", "none". "Research Facilities Section, cite precedent cases, other than published rulings, or those quoted in the tax services", "none".

"Other relevant authorities found", "none".

"Is ruling covered by law, regulations, published rulings or decision?" It is recorded here as Regulations paragraph 1.1502-14-C.

Question: "Does ruling modify, or revoke a principle of any published ruling?" "None".

Next question: "Does ruling affirm, modify or revoke a principle of a CUR or AM?" "None".

"Action to be taken", the block for publish is not checked, the block for do not publish is checked.

Also it is checked for "do not digest" or "digest".

Mr. Duncan: It's checked for digest.

The Witness: It's checked for digest.

There is a little document here as to whether this has—I might say—well, this isn't really in order of chronology. Should I refer to the date of this document?

Mr. Duncan: Yes, if you want to.

The Witness: This document, this last document that I am referring to was initiated on November 12, 1959. There is another document here as to whether—

By Mr. Davis:

Q. What is that document?

Mr. Duncan: It's the one he has been referring to.

Mr. Davis: Oh, I see.



The Witness: There is another little sheet, piece of paper; it's a document which apparently is a notification as to whether in publishing this ruling it has a top priority or secondary priority. This is marked as a secondary priority.

There is a memorandum routing slip in which there is a memorandum through the Bulletin Branch apparently in which it says the case has not been recommended, or has been recommended for nonpublication; however, it is being sent for digest purposes. I don't know whether that's a part of the file, but there are two little scribbled notes which apparently are not part of the file.

Mr. Duncan: No, they are not part of the file.

The Witness: On the righthand side of the file is the original and apparently two copies of a request for ruling dated December 28, 1955, which is the same as Government's Exhibit 7-A.

Mr. Duncan: May I clarify something here, Mr. Davis. Government's Exhibit A on page 2 refers to Exhibit A and Exhibit B to that request for ruling. What are those?

The Witness: Exhibit A is a quote of the applicable code and regulations sections, it refers to Code Section 831-A, to Code Section 204-A-1 and then it goes on.

Mr. Duncan: A number of sections?

The Witness: A number of regulations sections.

Mr. Duncan: What is Exhibit B to that?

The Witness: Exhibit B, the taxpayer has attached to this request for a ruling a copy of our ruling letter dated February 5, 1947, which is the same as Defendant's Exhibit 4.

The next document is—

By Mr. Davis:

Q. Did you say that on the righthand side there were some papers that were not really part of the file?

A. On the lefthand side. There were two penciled things here that I don't think are part of the time, just some scratching of some kind.

Q. Oh.

Mr. Duncan: Why don't you go on, Mr. Swartz.

The Witness: The next document is a copy of a ruling letter to a taxpayer, dated January 18, 1956, which is the same as Defendant's Exhibit 7, signed by the Director of the Tax Rulings Division, and in this particular case it is apparent that my name was signed by Mr. Thurston.

The next document is merely a transmittal memorandum sending this along the line to Mr. Cleos, who was Assistant Chief of the Branch at that time.

The next document is to the same taxpayer dated January 18, 1956 which is in answer to application filed by the taxpayer on form 1128 requesting permission to change its accounting period. This letter grants permission to change the basis of filing of this taxpayer's federal income tax return from the present taxable year to a new taxable year. The present taxable year in this case ending on September 30. I'll read this:

"Your present taxable year ends on September 30th. The last prepared on the present basis is for the year ended September 30, 1955. Your next taxable year ends on December 31. In order to effect the change to the new basis, your return will be required for the short period beginning October 1, 1955 and ending December 31, 1955."

Shall I go on? It's the usual form.

By Mr. Davis:

Q. Is this a form 1128?

A. This is a ruling letter which is in answer to a form 1128.

Q. Is the form 1128 in the file?

A. No.



Q. Where would that be?

A. Wait a minute. I don't see the form 1128 in the file, in this file.

Mr. Duncan: It's not in the file?

The Witness: It's not in the file.

By Mr. Davis:

Q. Wherever reference has been made in these letter rulings marked Exhibits 2 to 7 inclusive to a condition that the parent company adopt a fiscal, or rather, a calendar year as a condition, wherever that has been specified, has there been any check made to see upon what conditions the consent was granted?

A. Yes.

Q. Do you have the files that would show?

A. We have some files indicating the request for a change and the granting of the request for the change.

Q. And the grounds for the request as well?

A. I'd have to check the file. These—many times these answers granting requests to change accounting periods are in form letters which are merely typed in with the dates which the returns are to be filed for and granting the request and containing a paragraph indicating that the—for example in this one, the net income shown on the short period return required to effect the change must be paid on an annual basis and computed in accordance with Section 443-B.

The next document is another bulletin publication recommendation in which the question is asked, or a publication recommendation and it has two boxes marked "publish" and "Do not publish", and this is checked publish.

Q. By whom was this prepared?

A. This apparently was prepared by a man to whom it was referred in this case, originally by D.D. who is David Deutsch. Dated January '56.

In the form of the publication it is checked recommended for publication in full text form.

Q. What is the next document after that? Is there anything to show the disposition made?

A. Not at this point. This is merely a recommendation, here.

The next document is a draft of a Revenue ruling. This apparently was prepared in the Bulletin Branch as a result of the recommendation made in this last form I referred to to publish the document.

On top of that is a memorandum from the Chief of the Bulletin Branch to the Director of the Tax Rulings Division transmitting a copy of the proposed Revenue ruling asking for consideration and review of the proposed Revenue ruling.

That has at the bottom of it a return memorandum to the Bulletin Branch for the signature of the Director of the Tax Rulings Division with three boxes: one "has my concurrence"; two "has my concurrence with the changes shown"; three "it does not have my concurrence for the reasons stated in the attached memorandum". The box that is checked is "has my concurrence with the changes shown". This is signed in my name by Mr. Thurston, Technical Advisor to the then Director of the Tax Rulings Division.

The next document is a copy of the proposed Revenue ruling, with apparently some minor pen and ink changes.

The next document is dated June 11, 1956, it is a transmittal memorandum to the Chief Counsel signed by the Chief of the Bulletin Branch. It is merely a form letter which is used for transmitting a proposed Revenue ruling for publication to the Chief Counsel for their consideration.

The next document is a memorandum from the Chief Counsel to the Bulletin Branch through the Assistant Commissioner Technical—

Q. What does that refer to, generally?

A. It refers to the proposed Revenue ruling which was referred to them for their consideration.

Q. What disposition was made of the recommendation for publication?

A. They recommend—

Mr. Rothe: Who is "they"?

The Witness: The Chief Counsel. The memorandum signed by, at least in the name of the Chief Counsel, recommends nonpublication of the ruling.

By Mr. Davis:

Q. Any grounds?

Mr. Duncan: Give them the grounds as stated here.

The Witness: Chief Counsel says they believe proper solution to the problem presented should be effected in amendment to the consolidated regulations.

The next document is a memorandum from the Chief of the Bulletin Branch to the Director of the Tax Rulings Division and the attention of the Chief of the Corporation Branch.

This memorandum is dated February 18, 1957 and merely informs the Chief of the Corporation Branch that the Chief Counsel feels the solution to this problem should be an amendment to the regulations and they should undertake—the L & R division of that office, with concurrence of the Technical Planning Division should undertake a project to effect such an amendment.

Mr. Duncan: What is the date of that?

The Witness: This is dated February 18, 1957.

The next document is merely a cover document which is a memorandum to the Bulletin Branch which says: "Do not publish", in view of this memorandum.

By Mr. Davis:

Q. Is there anything in the memorandum—

Mr. Duncan: There is now just one more document. Let him finish.

The Witness: There is just one more document which is the reply of the Chief of the Corporation Branch to the Chief of the Bulletin Branch. This is dated March 5, 1957, and it is indicated that this office agrees with the Chief Counsel's opinion with respect to the matter.

By Mr. Davis:

Q. This is from what office?

A. This is the reply back from the Chief of the Corporation Tax Branch to the Chief of the Bulletin Branch referring to his memorandum of February 18th in which he advises the Chief of the Corporation Branch of the opinion of the Chief Counsel.

Q. Is there anything in the opinion or the communication from the Chief Counsel which indicates why regulation is thought to be required as a solution to the problem?

A. It says the L & R Division of this office has in concurrence with the Division of Technical Planning undertaken the project to amend the consolidated return regulation to provide a solution to the problem raised by the instant case.

Q. Does the memo refer to a so-called General Counsel's Memorandum, GCM?

A. This is a GCM.

Q. GCM.

A. This is a GCM and it doesn't refer to any other GCM.

Q. Was there outstanding—there was a reference on one of the documents on the lefthand side of the file relating to Regs. 1-1502.14-C.

A. Yes.

Q. Is this the regulation which carried out the recommendation of the Chief Counsel in this memorandum?

A. I would guess on it at this point that that might be so. The GCM is dated in 1957 and the document referring to regulations 1.1502-14-C, which refers to published rulings and probably also means regulations was dated November 12, 1959.

Q. The Chief of the Corporation Tax Branch indicated that he concurred in the recommendation of the Chief Counsel; is that correct?

A. The procedure there was that if a ruling were submitted for publication, recommending publication, then eventually somewhere along the line someone objected to that recommendation after the Bulletin Branch had proceeded to prepare a Revenue ruling, that the Bulletin Branch had no authority to stop it; they had to send it back to the office of origination to get permission or to let them know and at least get their reaction to the recommendation not to publish.

Q. What would happen in the event of a disagreement between the office of origin and some other office?

A. Oh, I think that probably they would at this point, if there was a disagreement with respect to any parties in connection with the review as to publication, the chances are the parties would get together and attempt to reconcile their positions. If they couldn't at that level, they would probably refer it to the Director of the Tax Rulings Division, the Head of Interpretative, whoever it was that needed to get together and finally resolve it.

Mr. Duncan: You had better identify what interpretative is.

The Witness: Interpretative Division is the Division of the Chief Counsel's Office to which proposed Revenue rulings were referred for their comment or consideration.

By Mr. Davis:

Q. Is there any reason given as to why it is thought that the issuance of a ruling would not be an appropriate procedure, why a regulation was preferable?

A. The memorandum from the Chief of the Corporation Branch to the Chief of the Bulletin Branch indicates that the Chief Counsel had advised that steps were being taken in the Technical Planning Division to amend Section 1.1502-14(a) of the regulations to provide a solution to the problem presented in this case. The administration file is retained in the suspense file apparently for the purposes of seeing whether or not this Revenue ruling needs to be published after the regulations are promulgated.

Q. How about the Chief Counsel's memorandum?

Mr. Duncan: He read you the part from that, I believe.

By Mr. Davis:

Q. It didn't indicate why, why the regulation was necessary and why publication was inappropriate.

Mr. Duncan: I don't think he testified that a regulation was necessary.

Mr. Davis: I thought he did.

The Witness: The Chief Counsel says that the proper solution to the problem presented requires an amendment to the consolidated return regulation. The purpose wasn't—

By Mr. Davis:

Q. Why?

A. I mean this is the Chief Counsel.

Q. He doesn't elaborate as to why proper solution requires this, requires regulation rather than a ruling?

Mr. Duncan: He does and he doesn't. Mr. Swartz testified for what it does and it does not elaborate in that memorandum.

Tell Mr. Davis whether there is an elaboration on that point.



The Witness: The only elaboration is that it refers to the conflict between Section 843 of the code and Section 1.10502-14(a) of the consolidated returns regulations, which conflict is the reason why this practice has grown up in the Commissioner's office, to take care of that conflict in the regulations, as I understand it.

By Mr. Davis:

Q. Does he refer to the practice, to this as the practice?

Mr. Rothe: What you have just said, is that your own understanding or is that from the GCM?

Mr. Duncan: Now, just wait a minute. Let him answer one question at a time.

Mr. Davis' question is pending.

The Witness: This merely refers to his recommendation that there is a conflict between these two sections and he refers to section 843 of the code and section 1.1502-14(a) of the consolidated return regulations, and he says, in the opinion of this office—"It is the opinion of this office that the proper solution to the problem presented requires an amendment to the consolidated return regulation."

Mr. Duncan: Go on then.

The Witness: "and the L and R division of this office has with the concurrence of the Technical Planning Division"—and the Technical Planning Division is the Division of the Commissioner's Office or in the Technical Office that also deals with regulations. I go on to quote "undertaken a project to amend the consolidated return regulations to provide a solution to the problem presented by the instant case. In view of this the proposed Revenue ruling is returned without the approval of this office".

By Mr. Davis:

Q. Did you interpret, was this accepted as an expression by the Office of the Chief Counsel that the ruling was not in accord with existing directives, published directives?

A. I gather that what they said was rather than publish this position as a Revenue ruling that the problem should be solved by using the regulation processes, rather than the publication of a ruling. To that extent the ruling was held in abeyance.

Q. But as I understand you, the opinion says that there is a conflict between the consolidated return regulations and the regulations relating to the filing by insurance companies on a calendar year?

A. Oh, yes.

Mr. Rothe: My question was—I am going to have to ask you to drop back and pick up Mr. Swartz' characterization of the contents this GCM.

(The answer of the witness and Mr. Rothe's question were read as follows by the reporter:)

The Witness: The only elaboration is that it refers to the conflict between Section 843 of the code and Section 1.10502-14(a) of the consolidated returns regulations, which conflict is the reason why this practice has grown up in the Commissioner's office, to take care of that conflict in the regulations, as I understand it.

Mr. Rothe: What you have just said, is that your own understand or is that from the GCM?

The Witness: Well, if I understand the question correctly, what I said was that it was the conflict in these two regulations that caused the taxpayers to ask us what could be done about filing consolidated returns in view of the conflict in those regulations, and it was with the knowledge of the conflict in the regulations that—and I will say practice, policy, position, procedure was adopted whereby the Commissioner would find the means of granting these affiliated groups a way to file consolidated returns, despite the conflict. And the way that he found a way to do that is reflected in the rulings which were issued in this area.

Mr. Rothe: Mr. Swartz, my question was whether this is your understanding or is this what the GCM says?

The Witness: Oh, this is my understanding.

Mr. Rothe: That's all I asked. Thank you, sir.

By Mr. Davis:

Q. Mr. Swartz, you have testified that you are in charge not only of the issuance of rulings and regulations and requests for technical advice and you also respond to requests for changes in accounting methods and accounting periods, to your knowledge has there been issued by your office since the date of Exhibit 7, here, any ruling or request—or any ruling or letter of technical advice relating to the filing of a consolidated return by a parent on a fiscal year and a subsidiary insurance company on a calendar year?

A. I have no personal knowledge of any such ruling or any such request.

Mr. Duncan: I'm sorry. Is your question whether there have been any rulings subsequent to this?

Mr. Davis: Yes.

Mr. Duncan: All right. Okay, and I think he answered that.

By Mr. Davis:

Q. Have there been any rulings in which the issue of whether a subsidiary on the calendar year has the privilege of filing a consolidated return with the parent on the fiscal year, or any letter of technical advice in which this issue was involved?

A. You mean, this where an insurance company is involved?

Q. Yes.

A. With an insurance company involved, I know of no rulings that have been issued other than those we have discussed here today.

Q. I see.

Are you not familiar with a letter of technical advice issued to the District Director of Internal Revenue at Chicago in respect of the plaintiff in this particular case?

A. I think I addressed myself to rulings at this point.

Q. I see. I intended—I thought my question covered both rulings and letters of technical advice.

Mr. Rothe: Would you repeat the question.

(The question was read by the reporter as follows:)

By Mr. Davis:

Q. Have there been any rulings in which the issue of whether a subsidiary on the calendar year has the privilege of filing a consolidated return with the parent on the fiscal year, or any letter of technical advice in which this issue was involved?

A. I interpreted your question as being a request for a ruling with respect to whether a taxpayer who was requesting permission to change to a consolidated return. I am familiar with the consideration of the request for technical advice that was submitted in connection with this particular case.

Q. Do you have the file in the matter here?

Mr. Duncan: Yes, we have the file.

By Mr. Davis:

Q. Would you take us through the file in the same manner that you have in the other files?

Mr. Duncan: Could you tell us why this is relevant here.

Mr. Wilson: Just give us some idea.

Mr. Davis: There is asserted to have been a practice or some operation here that resolves the conflict between the regulations, an admitted conflict between the regulations and we would like to know how this has been considered and disposed of.



Mr. Wilson: You mean a request for rulings?

Mr. Davis: Sir?

Mr. Wilson: You mean a request for rulings, or what?

Mr. Davis: This I understand was a request for technical advice, at least the taxpayer was so advised. It is just within the same area as all these others.

Mr. Duncan: The sole one in here is a letter addressed to the taxpayer. The sole intergovernment request is the '44 one that resulted in a letter to the taxpayer, and it is not to my knowledge that your case resulted in any letter to the taxpayer, except for statutory notice of deficiency.

Mr. Davis: We have had offered in evidence several files, extracted from the records of the Office of Assistant Commissioner, Technical, bearing upon the area of the eligibility and the procedure whereby a parent on a fiscal year might be permitted to file a consolidated return with the insurance company on the calendar year.

The question here is a further effort to find out just how this question has been considered in another instance, the only instance of which this taxpayer has personal knowledge, and the determination of this issue, how this general area was handled is thought to be relevant, proper, and there may be admissions against interest by the defendant and we certainly know of no—

Mr. Wilson: That is between its own officers you want admission against us?

Mr. Rothe: Absolutely.

Mr. Wilson: All we have produced is the ruling file, seven ruling files that have gone to people in the way described by the witness and with the effect described by the witness.

Mr. Davis: If you know some ground upon which this is not—these documents are subject to privilege, I suppose you are in a position to claim it, but we certainly intend to ask the question and to seek an answer.

Mr. Wilson: I think you have skipped a point. You said, and rightly, that the documents are subject to privilege; before we get to the question, some relevance must be shown. So far you haven't shown any. Now, whether we will invoke privilege ultimately or not is another question, but we do invoke relevance, at this point.

Mr. Davis: To the extent that the memorandum from the Chief Counsel relating to Exhibit 7 acknowledges the existence of a conflict between the service regulations or the treasury regulations, rather—

Mr. Duncan: I think if you will look at the exhibits, in every one of those Revenue rulings, practically, there is set out the fact that there was a conflict.

Mr. Davis: All right. The question, then, whether there was a privilege to a taxpayer on the calendar year, an insurance company taxpayer to file a consolidated return with a fiscal year parent and the factors which enter into this determination on the part of the Internal Revenue Service are surely as relevant in the case of this taxpayer as in the case of all these seven others which have been considered here.

Mr. Rothe: Really more.

Mr. Wilson: With this taxpayer it wasn't a question of a ruling.

Mr. Davis: The taxpayer did request the technical advice.

Mr. Wilson: It wasn't a request for a ruling. This is what we have been discussing all afternoon.

Mr. Davis: Actually, the issuance of a letter of technical advice has priority, if you please. It is certainly considered on the same level as the letter ruling to a taxpayer.

Mr. Rothe: Perhaps Mr. Swartz could establish that for the record.



By Mr. Davis:

Q. Is there a directive, Mr. Swartz, relating to the issuance of letters of technical advice?

A. There are procedures in connection with technical advisory memorandums, yes.

Q. Are letters of technical advice considered in any different way, is there any difference in responsibility for the preparation and issuance of letters of technical advice and for issuance of ruling letters to taxpayers?

A. Oh, yes.

Q. What are they?

A. Ruling letters, of course, are sent to taxpayers. Requests for technical advice are submitted by our field offices and our advice goes to the field office without any communication to the taxpayer; in fact, not even any communication to the taxpayer as to what the result of our technical advice is.

Q. This deals with the communication to whom communicated. Within your own office, what differences are there in the procedures for consideration of the request for technical advice and for ruling letters?

A. The problems that are submitted by the Revenue Agents are probably similar and no different than the problems submitted by taxpayers, with the exception that problems submitted by Revenue Agents are usually in connection with issues that they have under audit and they are not in connection with what they can do or what are proposed transactions.

Q. What is the significance of this difference? Does it alter the principles involved, the substantive principles involved?

A. I'm not sure I understand your question. Insofar as a ruling is concerned, a taxpayer need not follow. It's short of a closing agreement. In connection with the request for technical advice, the memorandum is merely our

opinion with respect to the question proposed, and there is a procedure whereby, if the field office does not agree with our proposal, they have the authority to write back and ask us to reconsider our position.

They merely adopt the position we have taken. They are not necessarily bound by it. They adopt the position taken in our consideration of the question and our advice; they adopt it as their position.

Q. Is there, then, any basic difference in the review processes within your own office of a proposed letter of technical advice from a letter of ruling, the ruling letter to a taxpayer upon the same general subject matter?

A. There is no difference in the review procedure, no.

Q. If a request for technical advice involved the question of the circumstances under which a fiscal year parent could file a consolidated return with a calendar year insurance company subsidiary and involved the same circumstances as were set forth in a request for letter ruling, would there be any basic difference in the response or in the consideration and the type of response which would issue from your office?

A. I think it would depend on the question. We would respond to the particular question that was raised by the Revenue Agent. If the question, let's say, received, the request for technical advice was on an issue which was in a return already filed, was identical with a taxpayer's request which had not yet consummated his transaction but wished to consummate his transaction, the procedure would be the same.

In some situations, however, a wary taxpayer has to, for example, if the Revenue Agent had a transaction whereby they had transferred securities outside the country without getting permission from the Commissioner under Section 367, the procedure, of course, I think would be different.

Q. Right.

Now, is it not true, Mr. Swartz, that a letter of technical advice addressed to the District Director of Chicago with respect to the taxpayer, in this case the plaintiff, Allstate Insurance Company, did bear upon the entitlement, the asserted entitlement of the parent, the fiscal year parent and its filing or eligibility to file a consolidated return with the plaintiff, Allstate Insurance Company, an insurance company on the calendar year?

Mr. Wilson: Asserted by whom? You said asserted entitlement; you didn't say asserted by whom.

Mr. Davis: Asserted by the Internal Revenue Service.

Mr. Wilson: Where, Chicago or here?

Mr. Davis: Well, I'll strike, delete asserted.

Mr. Wilson: I think he can answer it yes or no.

Mr. Duncan: Yes.

The Witness: I would like to refresh myself. I assume that question was at least an adjunct to the question that they asked for some technical advice.

What I am getting at, I don't recall of having received a request for technical advice as to whether a taxpayer who had filed consolidated returns, or—you see, that wasn't particularly the issue—on a taxpayer who had proceeded to file consolidated returns on some basis in conflict with the regulations. To that extent, this was not the technical advice request, particularly, although the question as to whether a taxpayer had the privilege of filing a consolidated return apparently had to be part of the issue which was raised in the request for technical advice.

By Mr. Davis:

Q. Now, would you review, would you take us through that part of the file dealing with this request for technical advice which relates solely to the aspect of the privilege, asserted privilege of filing a consolidated return?

Mr. Wilson: You are asking, Mr. Davis, for a legal memorandum between the Chief Counsel and the offices and we decline to produce it.

Mr. Davis: I don't know. I am asking for whatever there is there that is not subject to a claim of privilege, and I think the burden is upon you to claim the privilege, whatever it is.

Mr. Rothe: We haven't yet asked to see any documents.

Mr. Wilson: No, you asked him what the documents said.

Mr. Rothe: We want to know what is in the file, what kind of documents and the nature of them.

Mr. Duncan: What happened to your relevancy objection for everything after 1951?

Mr. Rothe: It's still right there, big as life.

Mr. Duncan: There are legal memoranda in the file.

Mr. Wilson: That's right and we are the attorneys here who have custody of this.

Mr. Rothe: There is a question pending to the witness.

Mr. Duncan: He is directed not to answer.

Mr. Wilson: We direct him not to answer.

Mr. Rothe: Let the witness answer however he will.

Mr. Wilson: The witness has been told not to.

Mr. Rothe: But he has to answer.

Mr. Wilson: No, he doesn't.

Mr. Rothe: Are you telling him not to answer anything?

Mr. Duncan: Not go the file; the question was and go through the file.

The Witness: I have been advised by counsel not to answer the question.

Mr. Rothe: Thank you.

By Mr. Davis:

Q. Mr. Swartz, you indicated in the affidavit to which reference has been made here, executed by you on September 22, 1961, that no other formal request for rulings by taxpayers since 1945 along similar lines or involving

essentially the same issue had been located in the files of the Office of Assistant Commissioner, Technical.

Mr. Duncan: That's in the affidavit?

Mr. Davis: I beg your pardon. This is in a stipulation. I'm sorry. Mr. Swartz has not seen this stipulation.

Mr. Duncan: No, he has not, but, of course—yes, go ahead with your question.

Mr. Davis: I withdraw the question. I'm sorry.

By Mr. Davis:

Q. To your knowledge, were there any informal requests, anything other than formal requests, received, and, if so, what would have been their consideration and disposition?

A. I have no knowledge of any informal requests or any discussions; if there were any discussions, they apparently weren't made a matter of record.

Quite often taxpayers will drop in and consult with us as to how a ruling—these are merely oral discussions. Whether there was anything like that, I would have no knowledge. There probably wouldn't even be any record.

Q. When a ruling is published, what is its effect upon other taxpayers? At least, what was its effect in the period 1945 to 1951?

A. I would have to consult the Bulletin as to the effect of published rulings, actually. I believe at that time published rulings were expressed as opinions of the Service and at that time were not to be relied upon necessarily.

Q. Has the frontispiece page in the beginning of each one of the published, bound published volumes of the Bulletin the proper authority for what effect is to be given to a published ruling, would you say?

A. That's an expression of an opinion as to the effect of a ruling, or the treatment to be given a ruling. I believe there are caveats in there with respect to taxpayers or revenue agents not relying on certain rulings unless they are based on the same principles or based on all fours.

They don't constitute closing agreements.

Q. What is the effect—is there any effect upon another taxpayer of the issuance of a ruling that is not published?

A. Insofar as a ruling to a specific taxpayer is concerned, that taxpayer can not take that ruling and assume that it is a ruling to him.

Q. That is, if it's to somebody else?

A. Right. The taxpayer who receives the ruling is the taxpayer to whom the ruling applies. Another taxpayer cannot assume that that ruling is applicable to his situation or can be relied on by him with respect to that particular ruling to that particular taxpayer.

This, however, does not mean that this has not become a procedure of practice or position of the National Office with respect to answering similar or identical questions, if requested by the taxpayer; in fact, it indicates that we would give the same answer to other taxpayers, unless some position has been changed.

Q. What indicates this, now?

A. In my opinion, the fact that the position that was taken with respect to the answer to these requests for rulings, having been put in the Precedent File, that any other taxpayer requesting permission to do the same thing that these taxpayers were permitted to do would have received the same favorable response, at least up to now, because no position has been taken contrary to that position and these precedents have not been removed from the files.



Q. Now these precedents would be limited to the facts set forth in the request for a letter ruling and the circumstances summarized in the ruling letter itself.

A. The principles set forth therein. The mere fact that the dates might be different wouldn't make any difference, but the principles set forth therein, and this is the precedent that is used, the principles set forth in those files.

Q. I believe you have testified previously, and I wondered if you would care to reconsider whether there is any basic difference between—under the applicable Internal Revenue or applicable Treasury Regulations and relevant statutes, whether there is any basic difference between the conformity of a newly acquired insurance company subsidiary with the fiscal year parent in the filing of a consolidated return and—

Mr. Duncan: This is getting to be a long question, Mr. Davis.

The Witness: It's a long question; it's difficult for me to follow this question.

Mr. Duncan: Are you asking him his opinion as an expert?

Mr. Davis: No, he has read the ruling, he has said that he felt that there was something which would be applicable to every taxpayer similarly situated. I am trying to see what is his concept of similar situations.

Mr. Duncan: All right. I don't disagree with you, but I think it would be helpful if you would make your question just a bit shorter.

By Mr. Davis:

Q. All right. I'll be glad to try.

Is a similar situation entailed, in your opinion, in the problems of adapting a newly acquired insurance company to the filing of a consolidated return with a fiscal year

parent as with the conformity of the fiscal year parent with the calendar year subsidiary with which it has been affiliated for some prior period?

Mr. Duncan: Probably Mr. Swartz—

The Witness: I think I get the question. However, my response goes to the fact that we answer questions in both of those situations, situations which had affiliates or where the insurance company was acquired after the fiscal year of the parent and then these cases where they acquired the insurance companies before the period end of the parent.

In other words, what I am saying is in my opinion the position, policy that has been established, or that is set forth in the rulings that were issued and became part of our files would indicate to me that a parent who had had an insurance company and had it for some time would be accorded the same treatment that would have been accorded the taxpayers that were involved in these rulings.

By Mr. Davis:

Q. All right.

On what do you base that opinion in the letter rulings that were issued prior to December 31, 1950; namely, Exhibits 1, 2, 3, and 4?

A. In ruling No. 4 the insurance company was acquired prior to the end of the fiscal year parent, it wasn't acquired after the fiscal year of the parent, which would base it on the principles, as I understand it, and the assumption is that the Commissioner was trying to find a way to allow taxpayers to file a consolidated return in accordance with the intent of Congress, even though there was a conflict in the regulations where one of the affiliates was an insurance company. The way that was handled was merely to have the parent, by reason of, depending upon the facts, file short period years until it had established its conformity with the insurance company, at which time they could go on and file consolidated returns.

This whole practice, as I understand, was with the knowledge there was a conflict in the regulations. This is why the taxpayers asked the question, because of the apparent conflict in the regulations.

The Commissioner was aware of the conflict in the regulations, because of the fact that he thought that Congress had intended, to the extent practicable, for the Commissioner to allow taxpayers to file consolidated returns, that he had established the position under which this could be done in any case, whether or not this was a new insurance company, acquired insurance company, an old insurance company acquired before the date of the fiscal year, or acquired after the date of the fiscal year. I am talking now about the principle of what the Commissioner was attempting to do in connection with these rulings.

Q. You base this opinion on your examination of the ruling letters or upon what other information?

A. I base this upon what I gather from the fact that these ruling letters were issued, plus the documents which were considered here where it was recognized in the request and recognized that there was this conflict in the regulations, and that the Commissioner could very well have said, "There is a conflict in the regulations", or, "I'm going to adopt the hard-nosed position and deny anyone filing consolidated returns". He took the other position and found a way out, the aim being to allow these corporations to file consolidated returns, and he found an administrative way which was acceptable and adopted it, and I assume that, in my opinion, this became a practice which was adopted and would have been applied to all other taxpayers who were seeking the same ruling, asking for permission to do the same thing, just as the other taxpayers did and just as these other taxpayers were granted permission to do so, even to the extent, in one case, of filing two consolidated returns in order to conform.

Q. Yes. Now, this opinion is based upon the ruling letters and your examination of them. You, however, did not have anything to do with the actual issuance of the ruling letters; is that correct?

A. That is correct. I did not participate in the original issuance of these rulings.

Q. All right.

Does your office ever change its position on rulings, even though there is no change in the law or the regulations?

A. Oh, yes. When it changes its position, however, any precedents on which the previous position relied on are removed from the Precedent File and the new position placed therein.

Q. When you were executing the affidavit, did you at that time rely on your own personal reading of the files, or were you—(Pause)

Mr. Duncan: I'm sorry, Mr. Davis. Go ahead.

By Mr. Davis:

Q. Were you relying upon your own personal reading of the ruling letters and the requests for rulings or had you had an opportunity to read them ahead of time?

A. I had had an opportunity to read these rulings, plus the knowledge of having had considered this issue at one or other. I don't recall now when it was, but I know that I had discussed this particular issue when I was Director of the Tax Rulings Division.

Q. Did you have occasion to look into these files prior to the signing of the affidavit relating to the circumstances under which the Commissioner would grant permission to the parent on a fiscal year to change to a calendar year?

A. My affidavit was based on the reading of the facts contained in the ruling letter.

Q. You mean exhibits 1 to 7?

A. I don't know if 7 was in there or not, 1 through 6.

Q. All right.

But as you went through those files there was nothing, with perhaps one exception there is no reference to the granting of, the circumstances or conditions under which the Commissioner would grant the consent to the fiscal year parent to change to a calendar year; isn't that right?

Mr. Duncan: I believe he said that the matter had been checked out, Mr. Davis.

The Witness: At the time that this was being discussed with Mr. Levine—

By Mr. Davis:

Q. Did you read any of those?

A. Let me tell you what I did read. I read the ruling letters and at the time that I was reading these ruling letters I noticed that in some of them at least it said that if you secure permission to change your accounting period you will be granted, and I asked Mr. Levine, well, this is all fine, but was permission ever granted in any of these cases to change the accounting period, or were any requests made?

He, at that point, then checked the files for me and told me that there had been situations which followed up these ruling letters in which requests had been received to change to this period in conformity with suggestions set forth in the ruling letter; that permission had been granted and later on—I don't know what period it was, but that returns had been filed on that basis.

Q. Was there any ever denied; do you know?

A. There were none insofar as I knew that had been denied. There may have been one in which no permission had been requested.

Q. Was any variation, any dispensation as to the grounds that would be recognized for changing?

A. Of my own personal knowledge, I only have knowledge of the fact that in these particular rulings the requests—in some of them, the requests have been made, and that permission had been granted. I did not inspect those files.

Q. Do you know whether there was ever any formal determination of policy which might have been made either by the Commissioner of Internal Revenue or the Assistant Commissioner or anyone in a policymaking position which would support the proposition set forth in the last paragraph on page 2 of Exhibit 5 that this is the policy?

A. No. No, I know of none of my own personal knowledge.

Q. What is your concept of an administrative practice?

A. By administrative practice I understand that once a position has been adopted and set forth in a ruling letter that this, particularly if it is put in the Precedent File, it is always the practice to follow that ruling unless that particular ruling, if those are the facts involved, unless some consideration is made that we are changing that position.

An administrative practice, or policy, or position might be one which we have followed issuing rulings on the basis of those concepts without any reconsideration or backtracking or saying we were probably wrong, we ought to change our mind or change our position here and not proceed any longer to engage in this practice in which we have been engaging.

Q. Have you ever had occasion to define the term before as used here in the Internal Revenue Service?

A. I have never particularly had to define the word practice.



Q. Administrative practice?

A. Not particularly, no; not as administrative practice. I was going by the position, this is what the Internal Revenue Service has been doing, it has been their procedure, their policy, their position. Practice is as good a word, as far as I know. The practice has been to issue rulings along this line and there has not been any change in that practice.

Q. This is not a scientific term or term of art then?

Mr. Wilson: If you know.

The Witness: As far as I know it isn't.

By Mr. Davis:

Q. So that we can know just what the practice, in this description, of how an insurance company and a fiscal year parent might proceed to conform, would there be any way that a fiscal year parent and insurance subsidiary could file a consolidated return for the parent's fiscal year merely by having the parent notify the Commissioner that it was changing to a calendar year accounting period immediately thereafter?

In explanation of this question, would there not first have had to be filed a request to change on the part of the parent on form 1128, in accordance with the regulations, and consideration and consent by the Commissioner?

A. I'm not so sure about that. I was reading through the old regulations and some of the new regulations and I think there is a situation in which merely by notifying the Commissioner in some circumstances that an affiliated group can file a return without getting a request; they can merely notify, the taxpayer.

Q. Isn't that a case in which the subsidiary is changing to the year of the parent?

A. Changing to the parent's, right, merely notification.

Q. Otherwise, is it your understanding of these rulings that they would in every case require first that the parent apply for and obtain the consent of the Commissioner to change from the fiscal year to the calendar year?

A. I think we have so stated in these particular rulings.

Q. Yes.

Mr. Davis: Thank you.

*Further Examination on Behalf of Defendant.*

By Mr. Duncan:

Q. I would like you to refer to defendant's Exhibit 1 or '44, a ruling, and I believe it was your testimony that despite the reference in the ruling to the 1941 ruling we have not been able to locate that ruling of 1941?

A. Yes, I think that's right.

Q. Now this ruling revokes the 1941 ruling, does it not?

A. Yes, it does.

Q. This ruling was in the Precedent File?

A. The February 14, 1944 ruling which is Defendant's Exhibit 1 is in the Precedent File, yes, sir.

Q. When a ruling is revoked, what happens to the file?

A. When a ruling is revoked, a specific ruling to a taxpayer's request?

Q. Yes, by another ruling; what happens to the original ruling, the revoked ruling?

A. If it's our file, if it hasn't been sent to the Collector's Office, or it hasn't been destroyed, it's usually retained. We have a procedure of destroying some of our correspondence that is not in the Precedent File. I don't know what dates this correspondence was destroyed, but from time to time rulings that are not placed in the Precedent File because of their volume are destroyed, from time to time.

Q. When a ruling is revoked, is removed from the Precedent File—

A. Oh, if the ruling which is revoked had been a Precedent and was in the Precedent file, it, of course, would be removed from the Precedent File. If it was just a ruling which had not been put in the Precedent File, the Precedent File, the original, the original ruling no longer being a precedent or no longer even being adhered to, the chances are it would just remain in the general files or wherever the files were and probably eventually destroyed.

Q. You were questioned with respect to how a document, how a particular ruling got into the Precedent File, and I believe you testified going through these various files with respect to a form on the lefthand side which would have various blocks that would be checked—

A. Right.

Q. —and would have reasons for digesting. Now, when you referred to digesting, would you mean digesting for the Precedent File?

A. Oh, yes, they would not digest unless they put it in the Precedent File.

Q. I believe you identified a number of these rulings, several of them as having been initialed by Chief Counsel. Let's run through them here and see. There are 1944, the copy we have does not have initials, does it?

A. No, this exhibit does not have.

Q. Referring to the file which you referred to earlier, does the file indicate whether this document went to Chief Counsel or not?

A. Yes, this particular one went to Chief Counsel, yes.

Q. Now referring you to Defendant's Exhibit 2, do the initials on that exhibit indicate that that document was approved by Chief Counsel?

A. Yes.

Q. Now, referring you to Defendant's Exhibit 4, do the initials on that document indicate that it was sent to Chief Counsel?

A. Yes, sir.

Q. And approved by him?

A. Yes.

Q. Would approval by the Chief Counsel be an influencing factor as to whether a document would be digested and put into the Precedent File?

A. It would be a factor in digesting it and putting it into the Precedent File, and—well, yes.

Q. You were questioned with respect to the distribution of rulings to the field under a procedure entitled "Confidential Unpublished Rulings". Speaking from your recollection and experience as a Revenue Agent, did the field office and the people working in the field office consider these rulings distributed to the field offices of importance?

A. Yes, we considered them important to the extent of being able to research to see what the line of thinking was if we had a situation that involved that type of issue.

I might say that we had other documents that we referred to also, there were GCMs, there were various other internal documents, other than CURs, which were put in the file and these were utilized to refer to with respect to the reasoning or the line of thinking in connection with this issue. Although, as I said before, we were not to cite them or quote them as being the reason we were doing it.

We would locate files, see what the line of thinking was or the reasoning and then we would adopt it in arguments; rather than saying the reason I am doing this is because I found a document, the reason I am doing this is because, based on the document itself, I have adopted this principle and am using it in this particular case.

Q. Was the distribution of these rulings to field offices an established procedure when you were a Revenue Agent?

A. I would assume so. Of course, I wasn't in the National Office, which at that time was doing the distribution, but certainly from time to time new documents would come in with these little card indexes which would be put in the index files, which we would use to locate the actual document.

Q. Speaking from your experience and recollection as a Revenue Agent working in the field office, were these documents considered by the agents as binding upon them?

Mr. Davis: I object to this question, if you please. Mr. Swartz is not qualified to state what other revenue agents may have considered to be binding on them. If he wishes to testify as to what he did or maybe how he used the CURs.

By Mr. Duncan:

Q. Tell us what you did, how you regarded these and why?

A. Well, as I explained, these, when we ran into a question, an issue that was involved that couldn't readily be answered by looking at the law and the regulations and published opinions, before we proceeded any further, let's say, to request technical advice or to go to our supervisors or people at the time who had more technical knowhow than we had, we would exhaust our other avenues such as consulting the index file in our office.

That index file was filed by subjects. I don't know how, whether a librarian did it, but we could find family partnerships, or we could find consolidated returns, and we could find traveling expenses and so forth.

In there, under that index would be a number of cards, there might be 25 cards, there might be only 2, but further on the card we would get a brief explanation or digest of what this particular ruling contained, what this particular document contained. If I took it from the digest card that there might be something in this document that could be used in connection with my issue, we went further and pulled the particular document out of the file, which was by name, and read it to see whether or not the reasoning therein could be used in relation to solving the problem that I had before me.

Mr. Davis: When the witness is using the term "we", you mean, really, that's the way you operated?

The Witness: That's the way I operated, and, of course, I saw many other revenue agents and also conferees at that time consult that file, and I assume they were using it, if they consulted it.

Mr. Davis: Thank you.

By Mr. Duncan:

Q. Mr. Swartz—

A. As a matter of fact, in the New York office this file was kept in and by the conference section, available to reviewers, revenue agents and conferees.

Q. Mr. Swartz, you testified with respect to the amount of reliance or lack of reliance which a non-receiver of a private letter ruling could give to that letter ruling. Would you explain that? Why does the Service not allow non-taxpayers, or non-receivers to rely upon this letter ruling?

A. This is just a long practice. First of all, with respect to letter rulings, as I say, other than those that are required by law or by regulation, they are primarily opinions or rulings issued by the Commissioner of Internal Revenue with respect to the facts presented in that particular case with respect to that particular taxpayer.



Now, in order to revoke a position, in other words, if we issue a ruling which we find later that we think is wrong or should not have been issued or that we want to change our position, the question then would be whether or not the taxpayer in reliance on a letter that he had received from the Commissioner and consummated the transaction could later on be penalized retroactively because the Commissioner had up and changed his mind.

A policy, a long-established policy of the Commissioner's has been established that with respect to a taxpayer who had received a ruling and who had consummated a transaction in reliance on that ruling to his detriment should not be penalized retroactively, if the Commissioner changed his mind. To that extent, Congress had given him authority under what is now Section 7805-B in the Internal Revenue Code to apply a ruling non-retroactively.

However, taxpayers were cautioned and I might say for the first time, this was announced, however, in 1954, that in general taxpayers who received rulings could rely on them and that in general the Commissioner, if he revoked the ruling, would not revoke it retroactively. In effect, saying that he would apply Section 7805-B to that particular situation.

However, the Commissioner did not want to be put in the position of issuing private rulings in an area which he did not publish, and assume that that was to become necessarily the nationwide position with respect to the facts in that particular case to all taxpayers. We wanted to consider the facts in a particular case.

The point being that in applying 7805-B, with respect to a ruling, he couldn't very well say that he was applying it to every taxpayer who read this ruling over the taxpayer's shoulder. That was primarily the reason.

However, quite often taxpayers have a knowledge of a ruling issued to another taxpayer and would request a

similar ruling of the Commissioner in order to get a document in his hands that would have the same effect on him.

Q. Frankly, there's a case up here in the 1953 ruling—

Mr. Rothe: Are you leading again, Mr. Duncan?

By Mr. Duncan:

Q. Is there a case of this here?

A. Yes, in my opinion I would think so. I would say that based on my analysis of the policy and practice that the Commissioner was engaging in, in connection with these problems that were presented to him in connection with this conflict in the regulations, it would indicate that any taxpayer during that period and up until now would have been granted the same privilege.

I say that because, had we changed our position with respect to granting this kind of a privilege, we would have removed these rulings from the Precedent File.

Mr. Duncan: That's it.

*Further Examination on Behalf of Plaintiff.*

By Mr. Davis:

Q. You announced or you stated the policy had been announced in 1954 with respect to reliance to be placed on the published rulings. What was the policy prior to that time?

A. The policy prior to that time had not been announced; there was never any published position with respect to dignity of a private ruling other than a closing agreement.

However, we had researched this problem in connection with adopting a policy in 1954 with respect to this number of situations in which a Commissioner had or a Deputy Commissioner or where a ruling issued by a proper person in Washington on which a taxpayer had relied to his detriment had been revoked, and we found, at least with re-

spect to the files that we could find going a considerable way back, that it was the continued practice of the Commissioner not to revoke a ruling to a taxpayer retroactively where all the facts were set forth and the transaction was consummated in accordance with the manner in which he had set forth in his request.

Q. If a ruling was issued and was not included in the Precedent File, did its issuance, in your opinion, constitute a practice?

A. I would say that certainly a ruling, whether it was in the Precedent File or not, would normally be followed, would normally be followed with respect to the facts in that particular case, unless the man who is considering the ruling felt that the original ruling was wrong.

There was nothing to prevent someone considering an issue with respect to which a previous position had been taken from taking issue with that position and considering whether or not we ought to change our position.

Q. Was the ruling letter dated December 11, 1941, referred to in Defendant's Exhibit No. 1, did that constitute practice between 1941 and 1944?

A. That I do not know.

Q. During that period of time it was applicable with respect to this particular taxpayer, wasn't it?

A. Oh, yes.

I presume that if there had been other situations that there might have been similar rulings issued until it was decided that we were changing our position on that.

Q. So that in this whole area of consolidated returns between the fiscal year parent and the calendar year subsidiary—

A. And an insurance company subsidiary.

Q. —and an insurance company calendar year subsidiary, yes, (continuing) there were but four letter rulings

to the best of your knowledge and research in your searching of your files here during the period from 1944 until 1951; is that correct?

A. That's what I've been told. I didn't personally go through these files, but the people that I told to research the files have indicated that this is so.

Mr. Duncan: Four, I think there are seven.

The Witness: Up through '50.

Mr. Duncan: I'm sorry.

Mr. Davis: Thank you.

I have read the foregoing pages, 1 through 195, inclusive, which contain a correct transcript of answers made by me to the questions therein recorded.

/s/ Harold L. Swartz

#### CERTIFICATE OF NOTARY PUBLIC

I, Jo Ann Withers, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me stenographically and thereafter reduced to typewriting under my direction; and said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

/s/ Jo Ann Withers

Notary Public in and for  
the District of Columbia

My commission expires February 14, 1965

## DEFENDANT'S EXHIBIT 1

February 14, 1944

[                      \* ] Insurance Company  
[                      ]

Gentlemen:

In a letter dated December 11, 1941 addressed to the collector of internal revenue at [                      ], a copy of which was furnished for your files, you were granted permission to change your taxable year from a calendar year to a fiscal year ending on November 30, effective as of November 30, 1941, in order that you might join with your parent company in filing a consolidated return.

In accordance with the permission granted a consolidated return was filed by your parent company, the [                      ] Corporation, for its fiscal year ended November 30, 1941 including therein the income of your corporation. The attention of the Bureau has now been called to the fact that your corporation is a stock casualty insurance company taxable under section 204 of the Internal Revenue Code. In view of the fact that the income tax regulations have uniformly construed section 204 of the Internal Revenue Code and the corresponding sections of prior revenue acts as requiring insurance companies taxable under those sections to file their returns on a calendar year basis, permission to change to a fiscal year basis should not have been granted in your case.

However, in view of the fact that a change was granted and that consolidated returns were filed pursuant to the authority so granted, consolidated returns will be accepted for the fiscal years ended November 30, 1941, 1942 and

\* Indicates deletion of name of taxpayer or other confidential matter.

1943, and the fiscal year ending November 30, 1944. Subsequent to November 30, 1944 consolidated returns will not be accepted unless such returns are filed on the calendar year basis. If the consolidated group desires to change to the calendar year basis effective as of December 31, 1944 application should be filed by the parent company on Form 1128 in accordance with the provisions of section 29.48-1 of Regulations 111.

In the event that the consolidated group, except for your corporation, desires to remain on the fiscal year basis each of the other corporations involved will be permitted to file individual returns on the basis of a fiscal year ending November 30, 1945 inasmuch as the election to file consolidated returns was made pursuant to the ruling from this office permitting a change in your taxable year.

2—[                      ] Insurance Company—

In view of the above Bureau letter dated December 11, 1941 is revoked insofar as it pertains to any taxable year beginning after November 30, 1944 and you will be required to file your returns on the calendar year basis after that date. If the consolidated group obtains permission to change to the calendar year basis, a consolidated return will be required for the month of December 1944. In the event that the remainder of the group elect to remain on the fiscal year basis, your company will be required to file a separate return for the month of December 1944 in order to again place you on the calendar year basis.

By direction of the Commissioner.

Very truly yours,

/s/ Norman D. Cann,  
Deputy Commissioner.



## DEFENDANT'S EXHIBIT 2.

May 26, 1945

[            ]  
[            ]

Received May 30, 1945

Bureau Information & Rulings Section  
Practice & Procedure Division  
Income Tax Unit

Gentlemen:

Reference is made to your letter of April 17, 1945, regarding the filing of consolidated returns upon the acquisition by a parent corporation on a fiscal year basis of an insurance company subject to tax under section 204 of the Internal Revenue Code which is required in accordance with the applicable regulations to report its income and deductions on the calendar year basis.

Your client, [            ] Inc., et al. and its subsidiary, [            ] Corporation, file consolidated income and excess profits tax returns on the basis of a fiscal year ending June 30. [            ] Insurance Company, a stock corporation which is taxable under the provisions of section 204 of the Internal Revenue Code, files its returns on the basis of the calendar year as required by the regulations. It is proposed that [            ] Inc., will acquire sufficient stock of [            ] Fire Insurance Company to qualify it as a member of the affiliated group. You make several inquiries which are dependent upon whether the calendar year or fiscal year must be adopted for the purpose of filing consolidated returns.

Section 23.14 of Regulations 104 provides that the taxable year of an affiliated group which makes a consolidated income tax return shall be the same as the taxable year of the common parent corporation; and, upon having elected to file consolidated returns, each subsidiary corporation

shall, not later than the close of the first consolidated income tax taxable year ending thereafter, adopt an annual accounting period, fiscal year or calendar year as the case may be, in conformity with that of the common parent. Section 33.14 of Regulations 110 contains a similar provision relating to the filing of consolidated excess profits tax returns.

As pointed out in your letter, section 29.204-1 of Regulations 111 requires that the returns under section 204 shall be made on the basis of a calendar year. The reason given for this provision is that section 204 of the Code provides that the underwriting and investment exhibit of the annual

2—[            ]

statement approved by the National Convention of Insurance Commissions shall be the basis for computing gross income, and that such annual statement is rendered on the calendar year basis. In the light of these reasons and in view of the fact that the provision requiring the filing of calendar year returns is specific, it is held that calendar year returns are required to be filed by insurance companies taxable under section 204 of the Internal Revenue Code and that [            ] Fire Insurance Company would not be permitted to report its income on the basis of a fiscal year ending June 30, for the purpose of filing consolidated returns.

Upon the assumption that permission would be granted to [            ] Inc., and [            ] Corporation to change their accounting periods to the calendar year as of July 1, 1945, and that the former corporation would acquire between July 1 and July 30, 1945 the required amount of the stock of the [            ] Fire Insurance Company to qualify the latter company as an affiliated corporation, you request

advice as to whether such insurance company may join with the other two affiliated corporations in filing consolidated income and excess profits tax returns for the period July 1 to December 31, 1945.

It is held that, if [ ] Inc. and [ ] Corporation secure permission and change to a calendar year basis effective December 31, 1945 and if [ ] Fire Insurance Company becomes a member of the affiliated group between July 1 and July 30, 1945, consolidated returns may be filed for the taxable period July 1, 1945 to December 31, 1945. The consolidated returns would include the income of the two non-insurance companies for the entire taxable period and the income of the insurance company from the date of acquisition to December 31, 1945, or, if the option provided by section 23.13(f) of Regulations 104 and section 33.13(f) of Regulations 110 to disregard the period of less than 30 days during which it was not a member of the group is exercised by such company, its income for the entire taxable period of the group. The insurance company would be required to file a separate return for the period in 1945 with respect to which its income is not included in the consolidated return. For the purpose of determining the income of the insurance company to be included in the consolidated return and in its separate return your attention is invited to section 23.32 of Regulations 104 and section 33.32 of Regulations 110.

In view of the conclusions reached herein, it is not believed necessary to mention the alternative questions contained in your letter.

Very truly yours,

/s/ William T. Sherwood,  
Acting Commissioner.

## DEFENDANT'S EXHIBIT 2-A

April 17, 1945

Mr. Norman D. Cann  
Deputy Commissioner of Internal Revenue  
Income Tax Unit  
Bureau of Internal Revenue  
Washington, D.C.

Attention: Mr. C. P. Suman  
Head, Practice and Procedure  
Division

Sir:

A question has arisen concerning the application of the Federal income and excess profits tax regulations to returns permitted and/or required to be filed by corporations, members of an affiliated group, where a subsidiary corporation, during its taxable year (determined without regard to the affiliation), becomes a member of the affiliated group.

One of our clients, [ ] Inc., and its subsidiary, [ ] Corp., which are affiliated corporations, file, under the provisions of Section 141 of the Code, consolidated Federal income and excess profits tax returns on the basis of a fiscal year ended June 30.

[ ] Fire Insurance Co., a stock corporation, taxable under the provisions of Section 204 of the Code, files its Federal income and excess profits tax returns on the basis of the calendar year as is required by Section 29.204-1, Regulations 111.

It is proposed by [ ] that between July 1 and July 30, 1945, it shall acquire the requisite amount of stock of [ ] to qualify the latter as a member of the affiliated group.

Under the provisions of Section 23.14, Regulations 104, and Section 33.14, Regulations 112, [ ] will be required to take the same taxable year as the parent corporation, which in this case is a fiscal year. Under the provisions of Section 29.204-1, Regulations 111, however, [ ] must report its income on a calendar year basis.

1. Assuming that the stock acquisition occurs in July, 1945, as above proposed, will [ ] be permitted or required in the filing of a consolidated return to report its income on the basis of a fiscal year ended June 30?

2. Assuming that [ ] must take the fiscal year basis of its parent, will [ ] report its income for the period January 1 to June 30, 1945 in a separate return under Section 23.13(g), Regulations 104, and Section 33.13(g), Regulations 112?

3. Assuming that, as we have been orally advised by your office, [ ] is not permitted to report its income on the basis of a fiscal year; that permission would be granted by the Commissioner to [ ] and [ ]

[ ] to change their accounting periods to the calendar year basis as of July 1, 1945; and further, that [ ] acquired, between July 1 and July 30, 1945, the requisite amount of [ ] stock to qualify the latter as an affiliated corporation, the following questions are posed:

2—[ ]

4. May [ ] as an affiliated group, file consolidated income and excess profits tax returns for the period July 1 to December 31, 1945?

5. If not, may the first two corporations file consolidated returns for income and excess profits tax purposes for such period?

6. would the requirement that [ ] file a separate return for the period January 1, 1945 to June 30, 1945,

under Section 23.13(g), Regulations 104, and Section 33.13 (g), Regulations 112, be in any way inconsistent with the requirements of Section 29.204-1, Regulations 111, that the return shall be made on the basis of a calendar year?

In connection with the question last listed, it will be noted that the first return of a stock fire insurance company or its final return in the year of dissolution, though encompassing a period of less than twelve months, nevertheless appears to meet the requirements of Section 29.204-1, above.

Since the precise time at which [ ] will acquire the requisite amount of [ ] stock will depend upon your ruling herein together with securing, before July 30, 1945, permission from the Commissioner, if necessary, for [ ] to change their method of accounting to the calendar year basis, it is respectfully requested that a ruling be issued at your earliest convenience.

Very truly yours,

/s/ B. Leidendorff

#### DEFENDANT'S EXHIBIT 3.

September 12, 1945

[ ] Corporation

[ ]

Attention: [ ]

Gentlemen:

Reference is made to your letter of August 9, 1945, regarding the filing of consolidated returns upon the acquisition by a parent corporation on a fiscal year basis of an insurance company subject to tax under section 204 of the Internal Revenue Code which is required in accordance with the regulations to report its income and deductions on the calendar year basis.



Your corporation and its subsidiaries are engaged in the automobile financing, small loan and accounts receivable financing business. Since 1940 the corporations have filed their income tax returns upon the basis of a fiscal year ending September 30 since this period closely represents the natural business year of companies in the automobile industry. Your corporation and all of the subsidiaries which are more than 95 percent owned have filed consolidated income and excess profits tax returns for the past three years and intend to continue filing consolidated returns. In May 1945 your corporation acquired approximately 65 percent of the capital stock of [ ] Insurance Company, a corporation engaged in underwriting fire and allied lines of insurance, and in connection with this purchase it agreed to offer all other shareholders the same price, \$10.00 per share, for their stock in such corporation. At the present time your corporation owns approximately 93 percent of the outstanding capital stock of the insurance company and it may ultimately acquire 95 percent or even 100 percent of the stock.

The insurance company files its income tax returns on the calendar year basis. Its accounts will be audited annually as of September 30, however, in order to enable

2—[ ] Corporation

their consolidation with the accounts of your corporation and its other subsidiaries. You point out the provisions of section 141(a) of the Internal Revenue Code to the effect that the making of consolidated returns shall be upon the condition that all corporations which are members of the affiliated group consent to all the consolidated income and excess profits tax regulations. You also call attention to the provisions of section 29.204-1 of Regulations 111 providing that the returns under section 204 shall be made on

the basis of the calendar year since the underwriting and investment exhibit of the annual statement, approved by the National Convention of Insurance Commissioners, shall be the basis for computing gross income and since such annual statement is rendered on the calendar year basis.

You point out the complexities involved in changing the closing date of a group of some 25 corporations for Federal income tax purposes as well as for State taxes and other reports. It is your understanding that the calendar year closing for insurance companies is desired in order to facilitate administration and examination of returns. You state that an independent audit of the insurance company's books on a September 30 basis would be available each year and that you would be willing to prepare a completely filled out annual statement for each year on a September 30 basis. You request advice as to whether it will be permissible under these conditions for your corporation and all of its subsidiaries including the insurance company to file consolidated income and excess profits tax returns on the basis of a fiscal year ending September 30.

Section 23.14 of Regulations 104 provides that the taxable year of an affiliated group which makes a consolidated income tax return shall be the same as the taxable year of the common parent corporation; and, upon having elected to file consolidated returns, each subsidiary corporation shall, not later than the close of the first consolidated income tax taxable year ending thereafter, adopt an annual accounting period, fiscal year or calendar year as the case may be, in conformity with that of the common parent. As pointed out in your letter, section 29.204-1 of Regulations 111 provides that the returns under section 204 shall be made on the basis of a calendar year.

3—[ ] Corporation

This office appreciates the burden involved in connection with the change of an accounting period from a fiscal year to that of a calendar year under the circumstances cited in your letter. However, in view of specific provision of the regulations requiring the filing of calendar year returns and in view of certain other considerations, it is deemed administratively inadvisable to permit the affiliated group in question to report its income on the basis of a fiscal year ending September 30 for the purpose of filing consolidated returns.

Very truly yours,

/s/ Norman D. Cann,

Deputy Commissioner.

#### DEFENDANT'S EXHIBIT 4.

February 5, 1947.

Received February 19, 1947

Bureau Information & Rulings Section

Practice & Procedure Division

Income Tax Unit

[ ]  
[ ]

Gentlemen:

Reference is made to your letter of October 15, 1946, in which you request on behalf of your client [ ], Inc. et al. a reconsideration of your letter of September 25, 1946, regarding the procedure to be followed in filing a consolidated income tax return and a consolidated excess profits tax return for the fiscal year ended September 30, 1946, by an affiliated group which acquired complete ownership of [ ] Fire and Marine Insurance Company as of July 1, 1946.

The [ ] Fire and Marine Insurance Company has been filing its returns on the calendar year basis as required by the provisions of section 29.204-1 of Regulations 111. It is proposed that (1) the affiliated group will file consolidated returns for its year ended September 30, 1946, including therein the income of the fire insurance company from July 1, 1946, to September 30, 1946; (2) the fire insurance company will file a separate return for the period January 1, 1946, to June 30, 1946, but will remain on the calendar year basis; (3) the parent company and the subsidiaries now on the fiscal year basis will make application to change to the calendar year basis effective December 31, 1946; and (4) a consolidated income tax return will be filed for the period October 1, 1946, to December 31, 1946, including the income of the fire insurance company for such period. You request approval of such procedure.

Section 23.14 of Regulations 104 provides that the taxable year of an affiliated group which makes a consolidated income tax return shall be the same as the taxable year of the common parent corporation; and, upon having elected to file consolidated returns, each subsidiary corporation shall, not later than the close of the first consolidated income tax taxable year ending thereafter, adopt an annual accounting period, fiscal year or calendar year as the case may be, in conformity with that of the common parent. Section 33.14 of Regulations 110 contains a similar provision relating to the filing of consolidated excess profits tax returns.

As pointed out in your letter, section 29.204-1 of Regulations 111 requires that the returns under section 204 shall be made on the basis of a calendar year. The reason given for this provision is that section 204 of the Code

2—[ ] states that the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners shall be the basis for computing gross income, and that such annual statement is rendered on the calendar year basis. In the instant case, therefore, the parent corporation and its other subsidiary corporations will be required for the purpose of filing consolidated returns to adopt a calendar year accounting period in conformity with that of the fire insurance company.

If [ ] Inc., and its subsidiaries change to a calendar year basis effective December 31, 1946, it is held that consolidated income and excess profits tax returns may be filed for the fiscal year ended September 30, 1946 including the income of [ ] Fire and Marine Insurance Company for the period July 1, 1946, to September 30, 1946, and a consolidated income tax return may be filed for the period October 1, 1946, to December 31, 1946, including the income of the fire insurance company for such period. The income of the fire insurance company to be included in the consolidated returns should be computed on the basis of its income as shown by its books if the accounts are so kept that the income for the periods can be clearly and accurately determined, but if the accounts are not so kept, the income to be included in the consolidated returns should be computed on the basis of that proportion of its income for the full period covered by its books which the number of days for which its income is included in the consolidated return bears to the number of days in the full period covered by its books. (See section 23.32 of Regulations 104 and section 33.32 of Regulations 110.)

The fire insurance company will be required to file a separate income tax return for the period January 1, 1946, to June 30, 1946. (Section 23.13(g) of Regulations 104.)

The ruling contained in office letter of October 10, 1946, is modified to the extent inconsistent with the foregoing.

Very truly yours,

/s/ *Joseph D. Nunan, Jr.*,  
Commissioner

#### DEFENDANT'S EXHIBIT 4-A

September 25, 1946

The Commissioner of Internal Revenue  
Washington, D.C.

Att: Practice and Procedure Division  
Re: Special ruling for [ ]  
Inc. and subsidiaries

Gentlemen:

Our client, [ ] Inc. and its subsidiaries have requested us to obtain a special ruling concerning the proper procedure to follow in the filing of consolidated income and excess profits tax returns. We are attaching hereto a power of attorney authorizing the writer to represent these companies in this matter and we would appreciate your directing your reply to us at the earliest opportunity.

The facts are as follows:

[ ] Inc. is the parent corporation of an affiliated group which filed a consolidated income tax return and a consolidated excess profits tax return for the fiscal year ended September 30, 1945. As of July 1, 1946 this parent corporation acquired complete stock ownership of the [ ] Fire and Marine Insurance Company. For the purpose of filing a consolidated income tax return, this insurance company is an includible corporation (Section 141 Internal Revenue Code). According to the Regulations (Regulations 111 Section 29.204-1), such an insurance company must employ the calendar year as



its accounting period for income tax purposes. Thus, the parent company and its other subsidiaries are on a fiscal year basis, its taxable year ending September 30, 1946, while the insurance company is required by law to use the calendar year. This insurance company, as an includible corporation, must be included in the consolidated income tax return which the parent corporation intends to file for the fiscal year ending September 30, 1946 (Regulations 111, Section 29.141-1(c)).

There is therefore an apparent conflict in this set of facts so that a special ruling is hereby requested indicating the proper procedure to follow for this consolidated group.

After reviewing the situation carefully with one of your representatives in Washington, we consider the following procedure to be proper and we respectfully request your permission to proceed as follows:

1. [ ] Fire and Marine Insurance Company will remain on a calendar year accounting period.

2. For the purpose of filing a consolidated income tax return with the affiliated group to which it belongs, the insurance company will be included in the consolidated return to the extent that a proportionate part of its annual income for 1946, corresponding to the number of days of its affiliation with the group during the taxable year, shall be included in the income of the group.

3. [ ] Fire and Marine Insurance Company will file a separate income tax return for the period from January 1, 1946 to June 30, 1946, constituting the period before it became a member of the affiliated group.

4. [ ] Inc. and its subsidiaries will request approval of the Commissioner to change their accounting periods to the calendar year. A consolidated income tax return will then be filed for the remaining part of 1946,

namely October 1st through December 31st, 1946. Included therein would be a proportionate part of the income for 1946 of the [ ] Fire and Marine Insurance Company.

5. After this short period consolidated return, the calendar year will be the taxable year for all members of the group and the consolidated return for 1947 will include the income of all subsidiaries, including the insurance company for the full calendar year.

Inasmuch as very little time remains until September 30th, the end of the present fiscal year, we would appreciate your replying to the request at the very earliest opportunity so that the necessary accounting data can be accumulated without delay.

Very truly yours,

/s/ .....

#### DEFENDANT'S EXHIBIT 4-B

In re: [ ] Inc.

Gentlemen:

Reference is made to your letter dated September 25, 1946 requesting a ruling with respect to the procedure to be followed by the above-named corporation and its subsidiaries in making its returns for the current year.

[ ] Incorporated, and its affiliated companies filed a consolidated return for its fiscal year ended September 30, 1945. As of July 1, 1946 the parent corporation acquired complete stock ownership of the [ ] Fire and Marine Insurance Company which in accordance with the provisions of section 29.204-1 of Regulations 111 had made its returns on the calendar year basis. You propose (1) that the affiliated group file a consolidated return for its year ended September 30, 1946 including therein

the income of the [ ] Fire and Marine Insurance Company from July 1, 1946 to September 30, 1946; (2) that the [ ] Fire and Marine Insurance Company remain on the calendar year basis and file a return for the period from January 1, 1946 to June 30, 1946, the date that it became part of the affiliated group and (3) that the parent company and the subsidiaries now on the fiscal year basis make application to change to the calendar year basis effective December 31, 1946.

As indicated in your letter, section 29.204-1 of Regulations 111 require the [ ] Fire and Marine Insurance Company to make its returns on the calendar year basis. Since this company may not change its accounting period as of September 30, 1946 it may not join with its parent company in a consolidated return. The affiliated group, therefore, must be denied the right to file a consolidated return for its fiscal year ended September 30, 1946.

The parent company and its subsidiaries which are now on a fiscal year basis may make application to change their accounting periods effective December 31, 1946 if they so desire. If approved, the affiliated group could then file a consolidated return for the period from October 1, 1946 to December 31, 1946, including therein the income of the [ ] Fire and Marine Insurance Company for that period. In order to receive consideration effective December 31, 1946, the applications for change in accounting period must, in accordance with the provisions of section 29.46-1 of Regulations 111, be filed on or before November 1, 1946.

Very truly yours,

/s/ (illegible)

Deputy Commissioner.

# DEFENDANT'S EXHIBIT 4-C

October 15, 1946

Commissioner of Internal Revenue  
Washington, D. C.

Att: *Frank T. Eddinfield*

Gentlemen:

On behalf of our client, [ ] Inc. and its subsidiaries, we respectfully request a reconsideration of our letter of September 25, 1946. This was in connection with the proper procedure to be followed in filing a consolidated income and excess profits tax return for this consolidated group which, since July 1, 1946, has included the [ ] Fire and Marine Insurance Company.

This problem was discussed at a conference held Monday, October 14th, between several representatives of the Bureau of Internal Revenue and representatives of the taxpayer.

In the light of this discussion, we request that the procedure outlined in our letter of September 25, 1946 be approved.

Very truly yours,

/s/ .....

# DEFENDANT'S EXHIBIT 5

August 21, 1951

[ ]

[ ]

Attention: Mr. [ ]

Gentlemen:

Reference is made to your letters of June 29, 1951, and to related correspondence from [ ] regarding the filing of a consolidated return for the fiscal year ending August 31 by the members of your affiliated group which includes an insurance company which is required in accordance with the applicable regulations to report its income and deductions on the calendar year basis.

You state that you have several affiliated companies, the principal ones being [ ] Company [ ] and [ ] Fire Insurance Company. Your company and all of your subsidiaries except [ ] Fire Insurance Company report their income on the basis of a fiscal year ending August 31. [ ] Fire Insurance Company is taxable under section 204 of the Internal Revenue Code, and in accordance with section 29.204-1 of Regulations 111, is required to and does report its income on the basis of a calendar year. You point out that section 24.14 of Regulations 129 requires that each member of the affiliated group report its income on the basis of the same taxable year as the common parent corporation and that, upon having elected to file a consolidated return, each subsidiary must adopt the annual accounting period of the common parent corporation not later than the close of the first consolidated taxable year ending thereafter. You further point out that there appears to be no provision covering the instant case where the insurance company is prevented by the regulations from adopting the annual accounting period of the common parent corporation.

You request to be advised whether your affiliated group may file a consolidated return for the taxable year ending August 31, 1951, if the other members of the group change their accounting period to the calendar year basis as of December 31, 1951. In letter dated July 25, 1951, from Mr. [ ] it is requested that your affiliated group 2—[ ] also be permitted to file a consolidated return for the fiscal year ended August 31, 1950. It is contended that your affiliated group should not be denied the privilege of filing a consolidated return for its first excess profits tax taxable year because the Excess Profits Tax Act of 1950 was not enacted until January 3, 1951, and the fiscal year members did not close their books on December 31, 1950.

As pointed out in your letter, section 24.14 of Regulations 129 states that the taxable year of an affiliated group which makes a consolidated return shall be the same as the taxable year of the common parent corporation; and upon having elected to file consolidated returns, each subsidiary corporation shall, not later than the close of the first consolidated taxable year ending thereafter, adopt an annual accounting period fiscal year or calendar year, as the case may be, in conformity with that of the common parent. Such section further provides that, if a change of accounting period is necessary in order to conform the accounting periods of the common parent and of its subsidiaries and if the requirements of section 29.46-1, Regulations 111 relating to notice of change cannot otherwise be complied with, such notice shall be furnished at or before the time of filing the consolidated return.

Section 29.204-1 of Regulations 111 requires that the returns under section 204 shall be made on the basis of a calendar year. The reason given for this provision is that section 204 of the Code provides that the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners shall be the basis for computing gross income and that such annual statement is rendered on the calendar year basis. In the light of these reasons and in view of the fact that the provision requiring the filing of calendar year returns is specific, it is held that insurance companies would not be permitted to report regularly their income on the basis of a fiscal year for the purpose of filing consolidated returns.

However, it has been the policy of the Bureau in cases of this kind to permit the filing of the first consolidated return of an affiliated group upon the basis of the fiscal year of the common parent corporation, including in such return the income of the insurance company for the period



corresponding to such fiscal year, but with the understanding that the other members of the group will immediately change their accounting period to the calendar year basis in order that the second consolidated return will be filed for the short period ending on December 31. It is apparent that, if a consolidated return is filed for the fiscal year ended August 31, 1950, it would be impossible at this time for the other members of your affiliated group to change their accounting period to the calendar year basis as of December 31, 1950.

3—[ ]

In view of the unusual circumstances here involved where the Excess Profits Tax Act of 1950 (enacted January 3, 1951) deferred the time for filing returns and paying the tax with respect to certain fiscal years ended after June 30, 1950, and where the consolidated regulations were not issued in final form until June 27, 1951, the Bureau will accept consolidated returns of your affiliated group for the fiscal years August 31, 1950 and 1951. The insurance company should include in each consolidated return its income for the period corresponding to the respective fiscal year. Furthermore, the insurance company should file an amended separate return for the period January 1, 1949, to August 31, 1949, to replace the return previously filed for the calendar year 1949. For the purpose of determining the income of the insurance company to be included in the consolidated returns and in its separate return, your attention is directed to section 24.32 of Regulations 129.

This ruling is based upon the assumption that each member of your affiliated group which reports its income on the fiscal year basis will change its method of accounting to the calendar year basis as of December 31, 1951, and that a consolidated return will be filed for the short period September 1 to December 31, 1951. In accordance with

section 24.14 of Regulations 129, the notices of change of accounting period on Form 1128 should be furnished at or before the time of filing the consolidated return. A copy of this letter should be attached to the returns filed for the years involved.

Very truly yours,  
/s/ John B. Dunlap,  
Commissioner.

# DEFENDANT'S EXHIBIT 5-A

July 25, 1951

Commissioner of Internal Revenue  
Washington, D. C.

Att: Coordinating and Advisory Division  
(Mr. Earl Heft)

Re: Privilege of [ ] Company  
to file a consolidated income and excess profits  
tax return with its subsidiaries for the taxable  
year ending in 1950

Dear Sir:

There was sent to you on June 29, 1951, a request for ruling to permit [ ] Company to file a consolidated income and excess profits tax return with its subsidiaries for the taxable year ending in 1951. [ ] Company now desires a further ruling to permit it to exercise such privilege for the taxable year ending in 1950.

It is understood that the members of the affiliated group are requesting an extension of time until September 15, 1951, for filing their returns for taxable years ending in 1950. The corporations who were members of the affiliated group throughout the period September 1, 1949, through August 31, 1950, were [ ] Company, [ ] Fire Insurance Company and [ ] Company.

As stated in [ ] Company's letter to you of June 29, 1951, except for [ ] Fire Insurance Company, all the members of the affiliated group report their income on the basis of a fiscal year ending on August 31. Accordingly, neither [ ] Company nor [ ] Company closed their books on December 31, 1950. For this reason, among others, it is requested that the affiliated group be permitted to file its short period consolidated income and excess profits tax return for the period beginning September 1, 1951, and ending December 31, 1951, as previously requested. Since the Excess Profits Tax Act of 1950 was not enacted until January 3, 1951, the group should not be denied the privilege of filing a consolidated return for its first excess profits tax taxable year because its fiscal year members had no opportunity to close their books on December 31, 1950.

For the foregoing reasons it is requested that a further ruling be issued to the effect that—

The affiliated group of which [ ] Company is the common parent corporation may make a consolidated income and excess profits tax return for the period beginning September 1, 1949, and ending August 31, 1950, including therein the income of every member of the affiliated group except [ ] Fire Insurance Company for the period September 1, 1949, through August 31, 1950, and including therein eight-twelfths of the income of [ ] Fire Insurance Company for the calendar year 1950, and four-twelfths of the income of [ ] Fire Insurance Company for the calendar year 1949. [ ] Fire Insurance Company shall be entitled to a pro rata refund of tax paid on its separate returns for the calendar years 1949 and 1950.

This letter is written on behalf of [ ], whose power of attorney is on file. In the event that you need additional information, please telephone [ ] or the undersigned at [ ]. A hearing is desired if for any reason the Bureau believes the foregoing facts (and those additional facts which it may call upon us to supply) do not afford sufficient basis for issuance of the desired further ruling.

Very truly yours,

[ ]  
[ ]

[ ]

#### DEFENDANT'S EXHIBIT 5-B

July 9, 1951

Commissioner of Internal Revenue,  
Washington, D. C.

Re: Privilege of [ ] Company to file a consolidated income and excess profits tax return with its subsidiaries for the taxable year ending in 1951

Dear Sir:

On July 2, 1951, [ ] Company filed an application for rulings as to the foregoing matter, at which time the undersigned formally advised a representative of the Bureau that a modification of such application might be filed within a few days for the purpose of eliminating one of the rulings therein requested.

The application filed on July 2, 1951, requested rulings on alternative sets of facts: (1) The right of the affiliated group to file a consolidated income and excess profits tax return if all the other members of the group changed their present fiscal year to the calendar year of the insurance company member of the group and (2) the right of the

affiliated group to file a consolidated income and excess profits tax return if the parent sold more than 5 per cent of the stock of the insurance company so that such company no longer would be a member of the affiliated group.

It is now desired that the Bureau of Internal Revenue issue a ruling only on the first proposal, i.e., a change in accounting period, and that a ruling not be issued on the second proposal, which relates to sale of part of the stock of the insurance company.

For the convenience of the Bureau, there is attached a copy of the application for ruling modified as if it had been filed in the form set forth above. Certain changes in language have been made in order to reflect Treasury Regulations 129, promulgated on June 29, 1951.

Very truly yours,

[ ]  
[ ]

[ ]  
encl.

June 29, 1951

Commissioner of Internal Revenue,  
Washington, D. C.

Re: Privilege of [ ] Company to file a consolidated income and excess profits tax return with its subsidiaries for the taxable year ending in 1951

Dear Sir:

[ ] Company is a corporation with its place of business located in [ ]. It owns stock in several other corporations, its principal subsidiaries being [ ] Company of [ ] and [ ] Fire Insurance Company. [ ] Company owns 96½% of the common stock of [ ] Company of [ ] and 100% of the stock of [ ] Fire Insurance Company.

[ ] Fire Insurance Company has only one class of stock outstanding. [ ] Company of [ ] also has outstanding a class of nonvoting preferred stock which is limited and preferred as to dividends.

Except for [ ] Fire Insurance Company, [

] Company and all of its subsidiaries report their income on the basis of a fiscal year ending on August 31. [ ] Fire Insurance Company is taxable under section 204 of the Internal Revenue Code, and by Treasury Regulations 111, sec. 29.204-1, is required to and does return its income on the basis of the calendar year.

Under section 141 of the Internal Revenue Code, the affiliated group of corporations of which [ ] Company is the common parent corporation has the privilege of making a consolidated return for the taxable year ending in 1951 in lieu of separate returns. However, Treasury Regulations 111, sec. 29.141-1(c) require that the consolidated return include every includible corporation which is a member of the affiliated group, and section 24.14 of the Consolidated Income and Excess Profits Tax Returns regulations (Treasury Regulations 129) requires each member of an affiliated group which makes a consolidated income tax return to report its income on the basis of the same taxable year as the common parent corporation. Provision is made in the last named section permitting each subsidiary to adopt the annual accounting period of the common parent corporation, upon having elected to file consolidated returns, at any time not later than the close of the first consolidated taxable year ending thereafter. However, there appears to be no corresponding provision allowing the members of an affiliated group, including the common parent corporation, to adopt the annual accounting period of a subsidiary insurance company taxable under section 204 of the Internal Revenue Code where that sub-



subsidiary insurance company is prevented by the applicable Treasury Regulations from adopting the annual accounting period of the common parent corporation.

Treasury Regulations 111, sec. 29.46-1 (relating to change of accounting period) require that application for permission to change the accounting period be made direct to the Commissioner on Form 1128. However, Treasury Regulations 129, sec. 24.14(b) permit Form 1128 to be furnished as a notice of change at or before the time of filing the consolidated return where a change of accounting period is necessary in order to conform the accounting periods of the common parent and of its subsidiaries.

[ ] Company and its affiliated group seek to have made available to them the privilege of making consolidated return of their income subsequent to August 31, 1950. [ ] Fire Insurance Company, however, is required by Treasury Regulations 111, sec. 29.204-1 to include its income for the period September 1, 1950, through December 31, 1950, in its return for the calendar year 1950.

For the foregoing reasons it is requested that a ruling be issued to the effect that—

The affiliated group of which [ ] Company is the common parent corporation may make a consolidated income and excess profits tax return for the period beginning September 1, 1950, and ending August 31, 1951, including therein the income of every member of the affiliated group except [ ] Fire Insurance Company for the period September 1, 1950 through August 31, 1951, and including therein eight-twelfths of the income of [ ] Fire Insurance Company for the calendar year 1951, or the actual income of the latter for the eight months January, 1951, through August, 1951. If, instead, the income of [ ] Fire Insurance Company for the entire

period September 1, 1950, through August 31, 1951, must be included in such consolidated return, [ ] shall be entitled to a pro rata refund of tax paid on its separate return for the calendar year 1950.

Thereafter, on or before March 15, 1952, the affiliated group of which [ ] Company is the common parent corporation would propose to file a short period consolidated income and excess profits tax return for the period beginning September 1, 1951, and ending December 31, 1951, including therein the income of every member of the affiliated group for this period. In the case of [ ], this consolidated return would include either its actual income for this 4-months period or four-twelfths of its income for the calendar year 1951.

Thereafter, the affiliated group of which [ ] Company is the common parent corporation would propose to make consolidated income and excess profits tax returns on the basis of the calendar year for the period beginning January 1, 1952, and subsequent calendar periods.

The foregoing to the contrary notwithstanding, no consolidated return of the affiliated group of which [ ] Company is the common parent shall include in income of the consolidated return taxable period the income of any member of the affiliated group prior to the time it became a member of the affiliated group or subsequent to the time it ceased to be a member of the affiliated group.

If [ ] is required by section 204 to file a separate calendar year return for 1951, despite the fact that its total income for such year will have been included in the two consolidated returns filed for 1951 by its affiliated group, no tax shall be deemed to be due upon such separate return of [ ].

If the affiliated group of which [ ] Company is the common parent corporation elects the foregoing procedure, [ ] Company and each member of its affiliated group other than [ ] Fire Insurance Company shall furnish the information required on Form 1128 to the Commissioner of Internal Revenue at or before the time of filing the consolidated return for the period ending August 31, 1951, including any extensions of such time.

There is attached a power of attorney designating [ ], to act for the company. It will be appreciated if you will address your reply to the company in care of [ ].

In the event that you need additional information, please telephone [ ]. A hearing is desired if for any reason the Bureau believes the foregoing facts (and those additional facts which it may call upon us to supply) do not afford sufficient basis for issuance of the desired ruling.

Very truly yours,

[ ] Company  
[ ]

#### DEFENDANT'S EXHIBIT 6

May 22, 1953

[ ]  
[ ]

In re: [ ] Company and  
[ ] Insurance Company

[ ]

Reference is made to your letter dated May 4, 1953, in which you request a ruling on behalf of the above-named corporations with respect to the filing of a consolidated return by the affiliated group.

You state that [ ] Company (hereinafter referred to as "Parent") owns all of the outstanding shares of stock of [ ] Insurance Company (hereinafter referred to as "Subsidiary"), and has owned such shares since the incorporation of Subsidiary in 1945. The Parent is engaged in the business of operating a public bus transportation system in the metropolitan area of San Antonio, Texas and has a fiscal year ending May 31. The Subsidiary is an insurance company taxable under Section 204 of the Internal Revenue Code, and in accordance with Section 29.204-1 of Regulations 111, is required to and does report its income on the basis of a calendar year. The affiliated group desires to file a consolidated return at as early a date as possible, and the Parent is prepared to make an application on Form 1128 for a change of accounting period to a calendar year basis.

You request a ruling on the following:

- (1) The earliest period for which a consolidated return may be filed.
- (2) Period to be included for each corporation in the first consolidated return filed.
- (3) Requirements as to annualization of the income of each corporation.

Section 24.14 of Regulations 129 provides that the taxable year of an affiliated group which makes a consolidated return shall be the same as the taxable year of the common parent corporation; and, upon having elected to file con-

2—[ ]

solidated returns, each subsidiary corporation shall, not later than the close of the first consolidated taxable year ending thereafter, adopt an annual accounting period, fiscal year or calendar year as the case may be, in conformity with that of the common parent.

Section 29.204-1 of Regulations 111 requires that the returns under section 204 of the Code shall be made on the basis of a calendar year. The reason given for this provision is that section 204 of the Code states that the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners shall be the basis for computing gross income, and that such annual statement is rendered on the calendar year basis. In the instant case, therefore, the Parent will be required for the purpose of filing consolidated returns to adopt a calendar year accounting period in conformity with that of the insurance company.

Upon the basis of the facts submitted, it is held that if the Parent obtains permission to change to a calendar year basis effective December 31, 1953, a consolidated return may be filed for the fiscal year ended May 31, 1953, including the income of the Subsidiary for the period June 1, 1952 to May 31, 1953, and a consolidated return may be filed for the period June 1, 1953 to December 31, 1953, including the income of the Subsidiary for such period. The Subsidiary will be required to file an amended separate return for the period January 1, 1952 to May 31, 1952, to replace the return previously filed for the calendar year 1952. For the purpose of determining the income of the Subsidiary to be included in the consolidated returns and in its separate return, your attention is directed to Section 24.32 of Regulations 129. Inasmuch as the consolidated return for the short period June 1, 1953 to December 31, 1953, is on account of a change in the accounting period, the consolidated net income and the consolidated Section 433(a) excess profits net income shall be placed on an annual basis pursuant to the provisions of Section 47(c) and 433(a)(2) of the Code.

A copy of this letter should be attached to the returns filed for the years involved.

Very truly yours,

/s/ *Norman A. Sugarman*,  
Assistant Commissioner.

By /s/ *H. T. Swartz*,  
Head, Technical Rulings  
Division.

Enclosure:

Copy of this letter.

#### DEFENDANT'S EXHIBIT 6-A

[                      ]  
[                      ]

May 4, 1953

Commissioner of Internal Revenue  
Washington 25, D.C.

In re: Request for Ruling,

[                      ] Company and  
[                      ] Insurance Company

Dear Sir:

On behalf of the subject companies we wish to file herewith, in triplicate, a request for ruling relating to the filing of consolidated income tax returns by said companies.

Also enclosed herewith are powers of attorney from each of the subject companies and fee statements duly executed by the persons named in said powers of attorney. Each of these instruments is submitted in triplicate.

It is the taxpayers' desire to file a consolidated return for the earliest period possible and therefore your prompt attention in rendering a ruling in this case will be appreciated.



[ ] and I have a conference set in your office for May 11, 1953, relative to another matter. If convenient, I would like to discuss the subject request for ruling with the party handling same some time during the afternoon of May 11th. Please advise me if a conference at such time will be agreeable.

Very truly yours,

[ ]  
[ ]

[ ]

### REQUEST FOR RULING

to the

Commissioner of Internal Revenue

with reference to

Proposed Filing of Consolidated Return by

[ ] COMPANY, PARENT

and

[ ] INSURANCE COMPANY, SUBSIDIARY

April 16, 1953

Commissioner of Internal Revenue, Washington 25 D.C.

Re: [ ] Company and

[ ] Insurance Company

Dear Sir:

A ruling is respectfully requested on a prospective transaction with reference to a consolidated income tax return, the essential facts of which are given below:

#### I. STATEMENT OF FACTS

The [ ] Company, hereinafter sometimes referred to as the Parent, a Delaware corporation with its principal place of business at [ ] owns all of the outstanding shares of the [ ] Insurance Company, hereinafter sometimes referred to as the Subsidiary, a [ ] corporation, whose principal

place of business is at [ ] and has owned such shares since the incorporation of [ ] Insurance Company in 1945. The Parent corporation has a fiscal year ending May 31, and the Subsidiary files its income tax returns on a calendar year basis.

The companies desire to file a consolidated return at as early a date as possible. Due to the fact that the Insurance Commission of the State of [ ] requires Insurance Company, the Subsidiary, to keep its books on a calendar year basis, it will be necessary for the Parent to obtain permission from the Commissioner to change its year to that of the Subsidiary. We are prepared to make application on Form 1128 for change of the Parent's fiscal year to a calendar year basis.

The Subsidiary, [ ] Insurance Company, is an insurance company other than life or mutual and is taxable under Internal Revenue Code Section 204.

The business of the Parent is the operation of the [ ]. The Insurance Company, Subsidiary, was originally formed to insure the [ ] Company, Parent, against liability resulting from injury and damage claims. The Insurance Company, Subsidiary, at first insured only its Parent. Now, however, it is writing insurance generally, but no life insurance. It is not a mutual insurance company.

#### II. STATEMENT OF THE LAW

Internal Revenue Code Section 141—

##### CONSOLIDATED RETURNS

“(a) PRIVILEGE TO FILE CONSOLIDATED RETURNS.—An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making a consoli-

dated return for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group."

"(d) DEFINITION OF 'AFFILIATED GROUP'.

—As used in this section, an 'affiliated group' means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if—

- (1) Stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of each of the includible corporations (except the common parent corporation) is owned directly by one or more of the other includible corporations; and
- (2) The common parent corporation owns directly stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of at least one of the other includible corporations.

As used in this subsection, the term 'stock' does not include nonvoting stock which is limited and preferred as to dividends."

"(e) DEFINITION OF 'INCLUDIBLE CORPORATION'.—As used in this section, the term 'includible corporation' means any corporation except—

- (1) Corporations exempt from taxation under section 101.
- (2) Insurance companies subject to taxation under section 201 or 207.
- (3) Foreign corporations.
- (4) Corporations entitled to the benefits of section 251, by reason of receiving a large percentage of their income from sources within possessions of the United States.
- (5) Corporations organized under the China Trade Act, 1922.
- (6) Regulated investment companies subject to tax under Supplement Q.
- (7) Any corporation described in section 449, or in section 454(d)(f), and (g) (without regard to the exception in the initial clause of section 454), but not including such a corporation which has made and filed a consent, for the taxable year or any prior taxable year ending after June 30, 1950, to be treated as an includible corporation. Such consent shall be made and filed at such time and in such manner as may be prescribed by the Secretary.
- (8) Regulated public utilities described in section 448(d) which compute their excess profits credit under section 448 but not including any such regulated public utility which has made and filed a consent, applica-

ble to the taxable year, to compute its excess profits credit without regard to section 448. The consent shall be made and filed at such time and in such manner as may be prescribed by the Secretary. The consent shall be applicable to the taxable year for which filed and to each consecutive subsequent taxable year for which a consolidated return is filed."

In our case, it is believed that a consolidated return of the two companies is permissible due to the fact that the two companies form an affiliated group in accordance with the definition in Section 141(d) of the Internal Revenue Code. The Parent owns all of the stock of the Subsidiary. The corporations are both includible corporations in accordance with the definition in Section 141(e) of the Internal Revenue Code.

### III. REQUEST FOR RULING

On behalf of the corporations mentioned above it is respectfully requested, in the absence of informative regulations, that the Commissioner rule on the following:

- (1) What is the earliest period for which a consolidated return may be filed?
- (2) What months' operations must be included for each corporation in the first consolidated return filed?
- (3) What annulization of the income will be required in the case of each corporation?

It is of considerable importance to the taxpayers that a consolidated return be filed for as early period as possible. Accordingly your prompt attention in rendering a ruling will be indeed appreciated.

Powers of attorney in duplicate and statements relative to fees are enclosed for the following taxpayers:

[ ]

[ ]

In accordance with the terms of the powers of attorney submitted herewith, it is requested that correspondence on this matter be addressed to the following:

[ ]

[ ]

Respectfully submitted,

[ ]

[ ]

### DEFENDANT'S EXHIBIT 7

Jan. 18, 1956.

[ ]

[ ]

Gentlemen:

This is in reply to your letter dated December 28, 1955, in which you request a ruling with respect to the filing of consolidated returns upon the acquisition by your corporation of an insurance company subject to tax under section 831(a) of the Internal Revenue Code of 1954.

Your company is a common parent of an affiliated group which filed a consolidated return for the period January 1, 1954, to September 30, 1954, having obtained permission to change from the calendar year basis. An extension of time has been obtained to March 15, 1956, for the filing of consolidated return for the fiscal year ended September 30, 1955.

On January 1, 1955, you acquired the [ ] Insurance Company, (hereinafter referred to as [ ]), a fire and casualty company taxable under the provisions of section 831(a) of the 1954 Code. [ ] files its returns on the basis of a calendar year as required by



section 39.204-1(a) of Regulations 118 (T. D. 6091, C. B. 1954-2, 47). On February 1, 1955, [ ] acquired 80% of the capital stock of [ ] Manufacturing Company, Inc., a newly-organized includible corporation.

You make several inquiries which are dependent upon whether the calendar year basis must be adopted for the purpose of filing consolidated returns.

Section 1.1502-14(a) of the Income Tax Regulations, provides as follows:

“(a) The taxable year of an affiliated group which makes a consolidated return shall be the same as the taxable year of the common parent corporation; and, upon having elected to file a consolidated return, each subsidiary corporation shall, not later than the close of the first consolidated taxable year ending thereafter, adopt an annual accounting period, fiscal year or calendar year as the case may be, in conformity with that of the common parent.”

2—[ ]

In view of the specific provisions of the regulations with respect to the filing of returns on a calendar year basis by insurance companies taxable under section 204(a)(1) of the 1939 Code and section 831(a) of the 1954 Code, it is concluded that \* \* \* would not be permitted to report its income on the basis of a fiscal year ending September 30, for the purpose of filing consolidated returns.

Inasmuch as the affiliated group of which your company is the common parent includes every corporation which was a member of the group within the meaning of section 1504(a) of the Code, it would not be proper to file one consolidated return on a calendar year basis for \* \* \* and its subsidiary, and another consolidated return on a fiscal year basis for \* \* \* Corporation and its remaining subsidiaries.

If permission is granted for you to change your accounting period to a calendar year basis effective December 31, 1955, a consolidated return may be filed for the fiscal year ended September 30, 1955, including the income of [ ] for the nine months ended September 30, 1955. A consolidated return may be filed for the period October 1, 1955, to December 31, 1955, including the income of [ ] for such period. For the purpose of determining the income of [ ] to be included in the consolidated return, your attention is invited to section 1.1502-32 of the Income Tax Regulations.

The application for change in accounting period (Form 1128) submitted with your letter, will be made the subject of a separate communication.

Very truly yours,

/s/ H. T. Swartz,

Director, Tax Rulings  
Division.

#### DEFENDANT'S EXHIBIT 7-A

December 28, 1955

[ ]  
[ ]

Received Technical Reference Branch Dec. 29, 1955  
Commissioner of Internal Revenue  
Washington 25, D.C.

#### REQUEST FOR RULING

Dear Sir:

[ ] Corporation, [ ] filed a consolidated Federal income tax return (Form 1120) for itself and certain subsidiaries covering the period from January 1, 1954, to September 30, 1954. Prior to this period, the corpora-

tion's taxable year had been the calendar year. Permission from your office was obtained for the change in taxable year.

A consolidated return for [ ] Corporation and its subsidiaries covering the full fiscal year ended September 30, 1955, is due to be filed on or before December 15, 1955. Form 7004 has been filed extending the filing date to March 15, 1955.

During the period from September 30, 1954, to September 30, 1955, [ ] Corporation acquired 80% or more of the capital stock of certain other includible corporations. Among these was [ ] Insurance Company, [ ], a fire and casualty company, taxable under the provisions of 1954 Code Section 831(a), which was acquired on January 1, 1955, and was still owned at September 30, 1955. [ ] Insurance Company filed returns on a calendar year basis prior to January 1, 1955. On February 1, 1955, [ ] Insurance Company acquired 80% of the capital stock of Lone Star Manufacturing Company, Inc., an includible corporation for consolidated return purposes. [ ] is a new corporation, having had no operations prior to February 1, 1955.

We are concerned with the apparent conflict in regulations applicable to the filing of consolidated returns and those applicable to the filing of a return for an insurance company. In that connection, we include herewith as Exhibit A what we believe to be the applicable code and regulations sections. Also included as Exhibit B is a copy of a ruling by your office in a situation similar to ours.

The apparent conflict in our case lies between the provisions of 1939 Code, Sec. 204(a)(1), Regulations 111, Sec. 29.204-1 (regulations have not been released on the corresponding 1954 code section), which requires the filing of an insurance company's return on a calendar year basis,

and 1954 code regulations applicable to consolidated returns, which require a subsidiary to adopt the fiscal year of its parent.

Under the assumption that [ ] Insurance Company would be included in the consolidated return for the period from January 1, 1955, date of its acquisition, to September 30, 1955, we have had that company prepare on an official annual statement form all required schedules and exhibits relating to its operations for that period.

In connection with the foregoing, we respectfully request your ruling with respect to the following questions:

1. Will a consolidated return of [ ] Corporation and subsidiaries for the year ended September 30, 1955, including [ ] Insurance Company operations for the nine months ended September 30, 1955, be acceptable to your office?
2. If the answer to question one is in the affirmative, will subsequent consolidated returns, including the insurance company, on the basis of a fiscal year ending September 30 be acceptable?
3. If the answer to question one is in the negative, will it be acceptable to file one consolidated return for [ ] Insurance Company and its subsidiary, [ ] Manufacturing Company, Inc., for the calendar year 1955 and another consolidated return for [ ] Corporation and its remaining subsidiaries for the year ended September 30, 1955?
4. As an alternative to any of the foregoing questions, may a consolidated return for [ ] Corporation and subsidiaries, including [ ] Insurance Company, be filed for the year ended September 30, 1955, under the condition that the affiliated group thereafter change its taxable year to the calendar year?

Form 1128, application for change in accounting period, is enclosed herewith with the request that it be considered only in case your ruling requires that the affiliated group change its taxable year to the calendar year.

Since a return for this affiliated group is shortly to become due, it will be appreciated if you can expedite your ruling on the questions presented herewith.

Respectfully yours,

(SEAL)

[                      ] Corporation  
[                      ]  
[                      ]

#### PLAINTIFF'S EXHIBIT A

Interoffice memorandum dated January 11, 1957 from John Potts Barnes, Chief Counsel, Internal Revenue Service, to Justin F. Winkle, Assistant Commissioner (Technical), Internal Revenue Service.

JUSTIN F. WINKLE

Assistant Commissioner (Technical)

Attention: *Bulletin Branch*

Reference is made to your memorandum (T:S:BRA JSD) dated June 11, 1956, by which you forwarded for the concurrence of this office a proposed revenue ruling based upon a communication (T:R:C-DD) dated January 18, 1956, in the case of the above-named taxpayer.

The proposed revenue ruling deals with an affiliated group of corporations which has previously filed consolidated income tax returns on a fiscal year basis. The common parent then acquires all of the stock of a fire and casualty insurance company, an includible corporation un-

der section 1504(b) of the 1954 Code, which insurance company is required, however, by section 843 of the Code to report its income on a calendar year basis.

The consolidated return regulations (section 1.1502-14 (a)) require that the includible subsidiary corporations adopt the annual accounting period of the parent. The proposed revenue ruling attempts to reconcile the conflict between section 843 of the Code and section 1.1502-14(a) of the consolidated return regulations.

It is the opinion of this office that the proper solution to the problem presented requires an amendment to the consolidated return regulations. The L. & R. Division of this office has, with the concurrence of the Technical Planning Division, undertaken a project to amend the consolidated return regulations to provide a solution to the problem presented by the instant case. In view of this, the proposed revenue ruling is returned without the approval of this office.

The administrative file is returned herewith.

/s/ *John Potts Barnes*

John Potts Barnes

Chief Counsel

Internal Revenue Service

Enclosure:

Adm. file



## PLAINTIFF'S EXHIBIT B

(Filed July 16, 1963)

Interoffice memorandum dated October 30, 1946 from Deputy Commissioner, Bureau of Internal Revenue, to Chief Counsel, Bureau of Internal Revenue.

Memorandum for the Chief Counsel

Bureau of Internal Revenue

In re: [ ]  
[ ]

The attached ruling letter in which it is proposed to modify Bureau letter dated October 10, 1946, with respect to the procedure to be followed by The [ ] Inc., and its subsidiaries in making its returns for the current year is transmitted for your consideration and recommendation as to the action indicated therein.

Attention is called to the fact that the situation in this case is somewhat different from that upon which C. U. R. 1661 was based in that the fiscal year of the parent company falling within the calendar year 1946 ends on a date subsequent to its acquisition of the stock of the insurance company. This circumstance raises the question as to whether the parent company by reason of such acquisition and notwithstanding the fact that it will comply with the provisions of the regulations (as applied in C. U. R. 1661) with respect to adopting an accounting period for 1946 to conform to the accounting period of the insurance company, will be precluded from filing a consolidated return for its fiscal year ended September 30, 1946.

It appears that under a strict interpretation of the regulations a denial of the right to file a consolidated return for the above-mentioned year would be justified but in view of the circumstances in the case and the apparent desire of the companies involved to fulfill the requirements of the regulations with respect to filing consolidated returns, it is believed that the granting of such right would not jeopardize the Government's interest and that from an administrative standpoint the proposed ruling is sound.

## PLAINTIFF'S EXHIBIT C

(Filed July 16, 1963)

Interoffice memorandum dated February 1, 1944 from J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, to Deputy Commissioner Cann, Bureau of Internal Revenue.

DEPUTY COMMISSIONER CANN

Income Tax Unit.

Reference is made to the attached letter (*not legible*) addressed to the Internal Revenue Agent in Charge, Chicago, Illinois, in response to his inquiry whether an insurance company other than a life or mutual insurance company subject to tax under section 204 may change its taxable year from the calendar year to the fiscal year of the parent in order to be included in an affiliated group for the purposes of filing consolidated excess profits tax returns.

The information submitted indicates that [ ] Insurance Company (which is stated to be a 100 per cent subsidiary of [ ] Corporation) is a stock casualty insurance company taxable under section 204 of the Internal Revenue Code; that it filed income tax returns on a calendar year basis for 1939 and 1940; and that, in order to join with its parent company (which files its returns on the basis of a fiscal year ending November 30) in the filing of a consolidated return for the year 1941, it secured permission from the Commissioner under date of December 11, 1941 (IT:P:T:1-ASH) to change its accounting period from a calendar year to a fiscal year ending November 30, effective for the period ended November 30, 1941.

In the letter prepared in this case it is now proposed to reverse the prior action of the Bureau and hold that an insurance company subject to tax under section 204 of the Internal Revenue Code and the corresponding sections of

prior revenue acts may not change from the calendar year basis to the fiscal year of the parent corporation for the purpose of filing consolidated returns.

2—[ . ] Insurance Company.

The regulations of the Department have uniformly construed section 204 of the Internal Revenue Code and the corresponding sections of prior revenue acts to require insurance companies taxable under those sections to file returns on a calendar year basis. It follows as a general rule that an insurance company subject to tax under section 204 may not be included in an affiliated group unless the group as a whole is prepared to file consolidated returns on a calendar year basis. This office accordingly concurs in the conclusion reached in the proposed letter in the instant case.

The companies involved in the instant case have, pursuant to authority granted by the Commissioner, filed returns for prior years on the basis of a fiscal year ending November 30, and a change of all the corporations from a fiscal year to a calendar year basis may not be effected under the provisions of section 29.46(1) of Regulations 111 prior to December 1944. It is therefore suggested that the revocation of the authority granted under date of December 11, 1941, be applied without retroactive effect and that the tax liability of the affiliated group for years prior to 1945 be determined on the basis of returns filed in accordance with the authority previously granted. In the event the group does not desire to file consolidated returns on a calendar year basis for 1945 and subsequent years, it is suggested that it be permitted to file individual returns inasmuch as the election to file returns on the basis of a

fiscal year ending November 30 was made pursuant to authority contained in a ruling of the Bureau which it is now proposed to revoke.

The administrative file is returned herewith.

/s/ J. P. Wenchel

J. P. Wenchel

Chief Counsel

Bureau of Internal Revenue

Attached:

Administrative file.

## DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO PRODUCE

### QUESTION PRESENTED

Whether the taxpayer's motion seeks the production of privileged matter?

### STATEMENT

On January 4, 1962, plaintiff filed a motion for production of documents in this case. The motion sought the production of:

1. A memorandum from Deputy Commissioner of the Income Tax Unit to the Chief Counsel dated October 30, 1946, which pertained to the ruling letter identified as Exhibit 4 to the deposition of Assistant Commissioner Swartz. This document is discussed in the deposition at pp. 118-119, 121-123.
2. All of the Chief Counsel's files pertaining to the rulings identified as Exhibits 1 through 7 to the deposition of Mr. Swartz.
3. The General Counsel's memorandum dated January 11, 1957, pertaining to the ruling letter identified



as Exhibit 7 to the deposition of Mr. Swartz. This document is discussed in the deposition at pp. 151-152, 153-158.

4. The technical advice memorandum from the Director, Tax Rulings Divisions, to the District Director, Chicago, Illinois, with respect to this case.

The Court heard argument on this motion on January 5, 1962. At the argument on the motion, the Government opposed the motion on a number of grounds, first, on the basis of relevance, second, on the basis of attorney-client privilege, third, on the basis that the document sought under paragraph 4 of the motion represented work-product within the doctrine of *Hickman v. Taylor*, 329 U.S. 495, and finally, on the basis of executive privilege. Due to the short notice, the Government requested some further time to submit a brief on the question of executive privilege and an affidavit of the Commissioner of Internal Revenue formally asserting executive privilege with respect to the documents sought. The Court granted the Government further time for the filing of such a brief and affidavit and set the motion for further argument on the afternoon of January 11, 1962.

At the hearing on the motion the taxpayer orally amended paragraph 2 of the motion to cover only General Counsel's Memoranda or other memoranda from the Chief Counsel to the Tax Rulings Division or the Assistant Commissioner (Technical) or the Commissioner. An inspection of the files has revealed that there is only one document falling within paragraph 2 of the motion as amended; namely, a General Counsel's Memorandum dated February 11, 1944, which pertains to the ruling letter identified as Exhibit 1 to the deposition of Mr. Swartz.

Attached to this brief is the Commissioner's affidavit formally claiming executive privilege against the production of these four documents. Since the Court so requested, this brief will deal only with the Government's claim of executive privilege. The Government, however, continues to assert the other grounds relied on in resisting the taxpayer's motion.

### ARGUMENT

#### TAXPAYER'S MOTION SHOULD BE DENIED SINCE THE DOCUMENTS SOUGHT TO BE PRODUCED ARE PRIVILEGED MATERIALS

The fundamental basis for claiming privilege in regard to intra-agency memoranda is the same one which supports the existence of Government privilege in the area of state secrets (*United States v. Reynolds*, 345 U.S. 1), informers (*Scher v. United States*, 305 U.S. 251), and Grand Jury Minutes (*United States v. Pittsburgh Plate Glass Co.*, 360 U.S. 395; *United States v. Procter & Gamble Co.*, 356 U.S. 677), as well as the privilege surrounding a lawyer's work-product (*Hickman v. Taylor*, *supra*). This basis is public policy. More definitively, there is a public policy in favor of the executive's legitimate interest in having internal agency processes operate with the freedom that comes only with a right to privacy. The Government privilege asserted in this case is a privilege for the privacy of internal and intra-agency memoranda, containing legal analysis, opinions, and recommendations, in short, the mental processes and work product of the executive.

For example, in a leading case in this area, *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (C. Cls.), Mr. Justice Reed, sitting by designation, denied a motion to produce an advisory opinion on inter-office policy, stating:



There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

Also, in *Continental Distilling Corp. v. Humphrey*, 17 F.R.D. 237, 241 (D.C. D.C.), the court, in holding that departmental interoffice memoranda and the mental operations of the Alcohol & Tobacco Tax Division of the Internal Revenue Service were not discoverable, stated:

Plaintiff is not entitled to discovery of the mental operations by which defendants arrived at their opinions or made their judgments.

Or, to state it a different way, as the court said in *United States v. Procter & Gamble Co.*, 25 F.R.D. 485, 489 (D.C. N.J.):

[T]he Government, operating as it does through a hierarchy of agents, must have the benefit of their full, free advices, and since those advices may well cover angles of a case which would hamper the Government's action if publicized, normally these advices should not be turned over to those with interests hostile to that of the Government.

See also, *Cenname v. Bingler*, decided January 30, 1961, D.C. W.D. Pa. (61-1 U.S.T.C., par. 15,346), and the very recent decision of Judge McNamee in *E. W. Bliss Co. v. United States*, Civil No. 35729, D.C. N.D. Ohio (as yet not reported; a copy of Judge McNamee's opinion is attached for the Court's convenience).

When the underlying reason for the privilege is applied to the documents sought to be produced here, it is clear, the Government submits, that their production should not be compelled. The memorandum from the Deputy Commissioner to Chief Counsel dated October 30, 1946, the two General Counsel's memoranda, and the Technical Ad-

vice Memorandum represent the opinions and analysis of one office of the Internal Revenue Service put down on paper to advise another. The Service, and for that matter, any Government agency, is necessarily dependent on the free interchange of ideas, advice, analysis and opinion between its divisions and employees in order to advance its business. These materials and memoranda are prepared without the anticipation that they will be disclosed; the writers feel free to discuss both sides of an issue because they believe that what they put down will not go outside the Service. If their memoranda were to be made public, or their disclosure could be compelled by taxpayers and the opinions in the memoranda used as admissions, inevitably the writers would feel constrained to limit their discussions in the memoranda to a pro-government analysis. In other words, Service employees could not analyze the situation and freely give their superiors or other divisions a fair and unbiased written view of the merits of the issue, discussing all sides of the issue. Consequently, public policy favors the privacy of intra-agency memoranda of this type.

This would appear particularly true with respect to the Technical Advice memoranda sent by the Tax Rulings Division to District Directors in response to requests for advice. The National Office of the Service, by necessity, must put its views and advice on the issues in written communications to the Directors. The memoranda may discuss all sides of an issue, and then come up with a conclusion on balance; it may set forth the opinions of other branches or divisions of the Service. It represents a legal interpretation of the issues in question, an analysis of the law, and a discussion as to what position the District Director should take. If documents such as these are to

be turned over to the taxpayers whose problems are discussed in the memoranda, so that taxpayer can in effect pick the Service's legal brain, it is obvious that the National Office's technical advice memoranda will have to be revised to express only the final decision.

The taxpayer cited *Boeing Airplane Co. v. Coggleshall*, 280 F. 2d 654 (C.A. D.C.) at the hearing on January 5, 1962. This case is not in point, and in fact, supports the Government's claim of privilege here. There, the court upheld, over a claim of privilege, a *subpoena duces tecum* for investigative or third-party reports submitted to the Renegotiation Board, after the Board called as witnesses some of the writers of these reports, but then went on to say (280 F. 2d at 660):

To the extent that the documents deal with recommendations as to policies which should be pursued by the Board, or recommendations as to decisions which should be reached by it, the claim of privilege is well-founded.

The court apparently attempted to make a broad differentiation between documents of a "routine factual nature" as against "'advice' by persons in a 'common cause,'" (280 F. 2d at 661)—in other words, "fact finding" as compared with "decision making" documents (280 F. 2d 662)—and upheld the claim of privilege as to the second class of documents.

The documents in question in this case clearly fall within the "decision-making" type. They are legal memoranda and discussions which, the Government submits, are privileged. Their production should not be compelled.

## CONCLUSION

The Government urges that the Commissioner's claim of executive privilege be upheld, and the taxpayer's motion to produce be denied.

Respectfully submitted,

LOUIS F. OBERDORFER,

*Assistant Attorney General.*

EDWARD S. SMITH,

JEROME FINK,

R. MICHAEL DUNCAN,

*Attorneys,*

*Department of Justice,*

*Washington 25, D.C.*

JAMES P. O'BTIEN,

*United States Attorney.*

January, 1962.

## AFFIDAVIT

Washington, )

) ss.

District of Columbia )

Mortimer Caplin, being duly sworn, deposes and says under oath:

1. I am the duly designated Commissioner of Internal Revenue, having official custody and control of the files and records of the Internal Revenue Service pursuant to such designation.

2. I have inspected Plaintiff's Motion for Production of Documents filed on January 4, 1962, in the above-entitled case, and have been advised that plaintiff orally amended, at the hearing on January 5, 1962, paragraph 2 of this motion to cover only General Counsel's memoranda

or other memoranda from the General Counsel to the Deputy Commissioner, Income Tax Unit, or the Assistant Commissioner (Technical) pertaining to the seven ruling letters which appear as Defendant's Exhibits 1 through 7 to the deposition of Assistant Commissioner Swartz.

3. I have examined the documents covered by plaintiff's motion, and production of these official intra-agency memoranda would be injurious to the public interest. The basis for my determination is that the matters demanded by the taxpayer constitute internal work-product, mental processes and opinions of representatives of the Internal Revenue Service, and, in addition, with respect to the documents sought by paragraph 4 of plaintiff's motion, a legal opinion by representatives of the Internal Revenue Service as to the merits of this very case.

4. I, therefore, assert a formal claim of executive privilege against the production demanded by the taxpayer.

Dated this 9th day of January, 1962.

/s/ Mortimer Caplin  
Mortimer Caplin  
Commissioner of Internal  
Revenue

Subscribed and sworn to before me  
this 9th day of January, 1962.

/s/ Ruth L. Apple

Notary Public

My commission expires June 14, 1966.

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

CIVIL ACTION NO. 35729

E. W. BLISS COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

RE: MOTION TO PRODUCE

McNAMEE, J.:

It is a recognized general principle that in actions involving the administration of Federal law to which the Government is a party, production of Government documents should be permitted unless "the Court is satisfied that it would be against public policy to do so." 4 Moore, *Federal Practice*, 2nd Ed., § 26.25(6), p. 1176. However, in all but exceptional cases it is considered against the public interest to compel the Government to produce inter-agency advisory opinions. *Kaiser Aluminum & Chemical Corp. v. U.S.*, 157 F. Supp. 939, 946 (Ct. Cl. 1958); *U. S. v. Procter & Gamble Co.*, 25 F.R.D. 485, 489, (D.C. N.Y. 1960); *Continental Distilling Co. v. Humphrey*, 17 F.R.D. 237; *Cennane v. Bingler*, Civil No. 17060 (W.D. Pa. 1961). The reasons underlying the privilege are stated fairly in *U. S. v. Procter & Gamble*, *supra*:

"(t)he Government, operating as it does through a hierarchy of agents, must have the benefit of their full, free advices, and since those advices might well



cover angles of a case which would hamper the Government's action if publicized, normally these advices should not be turned over to those interests hostile to that of the Government."

The taxpayer has not sustained the burden of showing a waiver of the privilege. In a supplemental affidavit filed November 13, 1961 plaintiff cited *Geometric Stamping Co. v. Commissioner of Internal Revenue*, 26 Tax Ct. 301 (1956) and *Klein Chocolate Co. v. Commissioner of Internal Revenue*, 36 Tax Ct. 12 (1961) as support for its position. As pointed out by the Government, however, an issue in the cited cases was whether the approval of the Commissioner to a change in the method of valuing inventory was shown by the acts of his agent. No such issue arises here nor does the question of consistency of method followed by the taxpayer appear to be pertinent. If consistency becomes an issue, plaintiff has available witnesses who can testify that the taxpayer followed a consistent method. There is no necessity for recourse to the transmittal letters to meet that issue. The issue here is whether the taxpayer has valued its inventory in accord with the applicable regulations. It is not apparent that the production of the transmittal letters is essential to the proper presentation of plaintiff's case. Good cause for the production of such documents has not been shown, and in the circumstances of this case the Government's claim of privilege is well taken.

The motion to produce is overruled.

/s/ Charles J. McNamee  
United States District  
Judge

December 13, 1961.

## BRIEF FOR THE DEFENDANT IN SUPPORT OF ITS PROOF OF ADMINISTRATIVE PRACTICE

### QUESTIONS PRESENTED

1. Is the testimony of Assistant Commissioner Swartz together with the exhibits offered evidence of a practice existing in the Internal Revenue Service?
2. Assuming that Swartz' testimony is evidence of a practice, what was the effect of the practice?

### STATEMENT

On September 11, 1961, the taxpayer filed a Motion for Summary Judgment and on September 26, 1961, the Government filed a Cross Motion for Summary Judgment, attaching an affidavit by Assistant Commissioner Swartz with respect to an administrative practice of the Internal Revenue Service. On October 13, 1961, taxpayer filed a motion for continuance of the summary judgment proceedings for the purpose of taking the deposition of Assistant Commissioner Swartz. The Court held several hearings on this motion. At a hearing on October 23, 1961, taxpayer's counsel presented the Court with an oral motion to strike the affidavit on the ground that the matter set out therein was irrelevant and inadmissible. Extensive briefs were filed by both parties on the relevance of the practice and a hearing on the motion to strike the affidavit was held on November 20, 1961. A further hearing was held on December 11, 1961, at which time the Court ruled that the affidavit should be stricken as insufficient and inadmissible to establish the fact of the practice (Tr. Dec. 11, 1961, p. 7). The Court went on to point out that the Government was free to use other evidence to establish the practice and that the Court's ruling to strike the affidavit was on the ground that it was inadmissible to prove this fact. The Court then directed the Government to proceed with the evidence relevant to the existence of the practice (Tr. Dec. 11, 1961, p. 8). The Court did not rule on the relevance of this practice.

On December 19, 1961, the Government deposed Harold T. Swartz, Assistant Commissioner of Internal Revenue. At a hearing on January 11, 1962, the Government offered the deposition of Mr. Swartz. The taxpayer objected to the admissibility of the deposition in evidence on several grounds. The Court accepted the offer of the deposition subject to taxpayer's objections. Taxpayer then offered three documents (Pltfs. Exs. A, B and C) and stated that it might wish to call further witnesses if the Court should sustain its objection. The Court then requested briefs as to what the deposition established and as to the merits of the taxpayer's objections to the deposition's admissibility.

### ARGUMENT

#### I.

#### THE EXISTENCE OF AN ADMINISTRATIVE PRACTICE IS RELEVANT TO A DECISION OF THE ISSUES IN THIS CASE.

It is appropriate here to summarize again for the Court the Government's purpose in introducing evidence with respect to an unpublished, administrative practice of the Internal Revenue Service in connection with this case. The sole issue in this case is whether the taxpayer qualifies for the so-called "growth" excess profits credit. Under Section 435(e) of the Korean War Excess Profits Tax Law, the taxpayer urges that it is entitled to the benefits of the growth credit and the Government maintains that it is not entitled to the benefits of the growth credit but must use the usual base period average income method. The point of dispute between the Government and the taxpayer is whether it meets the twenty million dollar total asset test contained in Section 435(e)(1)(A)(i). The question is under this total assets test, whether Allstate assets should be combined with those of its parent Sears, Roebuck, the Government maintaining that they should be so combined

and the taxpayer maintaining that they should not be. If Allstate's assets are combined with Sears, the total assets would be vastly in excess of twenty million dollars and Allstate would not qualify for the growth credit. If Allstate's assets are not to be combined with Sears, Allstate meets the test since its assets are less than twenty million dollars. The statutory language of the "total assets" test requires the combination of the taxpayer's assets with those "of all corporations with which the taxpayer has the privilege under Section 141 of filing a consolidated return" for its first taxable year ending after June 30, 1950. It should be noted that the statute in its very nature sets up a hypothetical situation. The statute is not in terms of combining the taxpayer's assets with those of corporations with which it did file consolidated returns but rather those with which it could file a consolidated return. As the Government views it then, the situation must be viewed in terms of whether the taxpayer could have filed a consolidated return with Sears, if it had wanted to.<sup>1</sup>

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<sup>1</sup> The Government wishes to draw the Court's attention to the fact that its primary position in this case is that the total assets test, as enacted by Congress, contemplated the combination of taxpayer's assets with all the assets of members of an affiliated group; thus, in the Government's view, if the taxpayer qualifies as a member of an affiliated group, its assets must be combined with those of the other members, for purposes of the total assets test and qualification for the growth credit. However, the taxpayer does not agree with this construction of the statute. It is in connection with taxpayer's theory of the construction of this statute that the administrative practice becomes relevant. Since the Court requested a brief only on this question, and not on the over-all merits of the case, the Government will not deal with its member of an affiliated group argument in this brief, or with certain other arguments which the Government

(Footnote continued)



Thus, it was the basic purpose of the Government in putting in evidence the existence of an administrative practice to show that if Allstate had wanted to file a consolidated return with its parent Sears, it would have been permitted to do so. In other words, the Government has shown that Allstate *could have filed* a consolidated return with Sears, because the Commissioner would have allowed it to do so in accordance with the well-established practice. The deposition of Mr. Swartz shows that, if Allstate had wanted to, it could have filed a consolidated return with its parent Sears. The mechanics of accomplishing this simply require that both Allstate and Sears file short period returns to bring them together on a calendar year accounting basis. From that point on, a consolidated return is filed on the annual basis. Government exhibit 5 spells out in some detail exactly how this was done in a comparable situation for this precise period.

As the Government views it, the deposition in this case shows that Allstate could have filed a consolidated return with Sears in accordance with a practice of the Internal Revenue Service. Accordingly, since Allstate could have filed a consolidated return with Sears for the first taxable year after June 30, 1950, its assets should be combined

(Footnote continued)

can make on the over-all merits of the case. This brief is confined solely to evidence as to what would have happened if taxpayer had wanted to file a consolidated return with its parent in the hypothetical situation posed by the statute, and will attempt to point out that under the practice of the Internal Revenue Service, it is reasonably clear that taxpayer could have filed a consolidated return if it had wanted to. Thus in the Government's view, even under taxpayer's theory of the statutory language, it is not entitled to prevail. For a fuller discussion of these questions, see the Brief for the Defendant in Opposition to Plaintiff's Motion to Strike Affidavit of Assistant Commissioner, pp. 5-9.

with Sears for purposes of the total assets test and it should not be entitled to use the growth method of computing its excess profits credit.

## II.

### THE GOVERNMENT HAS USED PROPER METHODS TO SHOW THE EXISTENCE OF AN ADMINISTRATIVE PRACTICE WITHIN THE INTERNAL REVENUE SERVICE

A. *The existence of an administrative practice within the Internal Revenue Service is a question of fact, to be proven by methods similar to those used in the proof of any fact.*

It is submitted that the existence of an administrative practice within the Internal Revenue Service should be proven by the same methods which are used to prove any other fact—that is, by introducing the testimony of a person acquainted with the facts, together with other evidence proving that the fact exists. In the present proceeding, the Government has introduced the testimony of Assistant Commissioner of Internal Revenue Harold T. Swartz, an individual who is probably more fully acquainted than is any other person in the nation with the facts concerning the administrative practices of the Revenue Service in issuing rulings. The Government has also introduced documentary evidence which together with Swartz' testimony clearly establishes the existence of the administrative practice in question. This documentary evidence, coupled with Commissioner Swartz' testimony, indicates that an unvarying administrative practice has existed in the Internal Revenue Service since 1944. Under this practice, rulings have repeatedly been given to affiliated corporate groups, one of which is an insurance company, granting the group permission to file consolidated tax returns.



Admittedly, there is little precedent with respect to methods of proving unpublished administrative practice within the Internal Revenue Service. But this hardly prevents a showing that such a practice does in fact exist. In approaching this problem, the methods used are strikingly similar to those used to prove the law of a foreign jurisdiction in an American court. In America, foreign law is regarded as a fact, and the courts require litigants to plead and prove the content of that law in a manner similar to the proof of any other evidentiary fact. See Schlesinger, *Comparative Law*, 32-140, Brooklyn, Foundation Press (1950).

The reasons for analogizing proof of administrative practice to proof of foreign law become clear when one examines the rationale behind the rule that foreign law is to be proven in the same way as any other matter of fact. The basic reason for this rule has been summarized as follows (Nussbaum, *The Problem of Proving Foreign Law*, 50 Yale Law Journal, 1018):

Although courts are expected to know their own law, they cannot be expected to know the law of other countries. Hence litigating parties must prove the applicable foreign law to the court.

There is one other reason for proving foreign law as a matter of fact:—the judicial materials needed to prove foreign law are often not available to a domestic court. The importance of this second factor is demonstrated by the history of the statutes which today generally permit state courts to take judicial notice of the law of sister states within the United States. Prior to the passage of these statutes, it was necessary to prove the "foreign" law of a sister state as a matter of fact. However, the practice of judicially noticing the law of a sister state did not de-

velop until the growth of law libraries and legal publishing services made the judicial materials of each state readily available throughout the country. See Nussbaum, *The Problem of Proving Foreign Law*, 50 Yale L. J. 1018, 1020-1023.

The reasons which have made it necessary to prove foreign law as a matter of fact are the same reasons which should impel the Court in the present case to allow the Government to prove administrative practice within the Internal Revenue Service as a matter of fact. Just as the Court cannot be expected to be familiar with the law of other countries, so the Court cannot be expected to know about all administrative practices within a federal executive department.

Because the problem of ascertaining this administrative practice within the Internal Revenue Service is similar to the problem of ascertaining the law of a foreign jurisdiction, it is submitted that the methods of solving these two problems should also be similar:—that administrative practice should be proven as a matter of fact just as foreign law is proven as a matter of fact.

At least one American court has so held. *State ex rel. Bartlett v. Davis*, 69 N.H. 350, 41 Atl. 267. In this case a witness was permitted to testify as to the contents of the files of the Internal Revenue Department office in Portsmouth, New Hampshire, and the significance of certain notations on records in those files. After referring to the rules of the Internal Revenue Department, the Supreme Court of New Hampshire held (69 N.H. 350):

No good reason appears why proof of them [the rules] may not be made in like manner as the laws of foreign states are proved.

B. *Assistant Commissioner Swartz was a proper person to offer testimony as to the existence of an administrative practice within the Internal Revenue Service.*

Assuming that the analogy urged above is accepted, the question arises whether correct methods of proving this administrative practice within the Internal Revenue Service have been used in the present case, in light of the evidentiary doctrines developed in cases in which the parties have introduced proof as to the law of a foreign jurisdiction. The basic American doctrine on this subject is summarized in *Ennis v. Smith*, 55 U.S. (14 How.) 399, 425:

The written foreign law may be proved, by a copy of the law properly authenticated. The unwritten must be [proved] by the parol testimony of experts.

Later Supreme Court cases indicate that the proper way of proving foreign law as a fact is to introduce a copy of any statute involved, or the deposition of one skilled in the law of the foreign jurisdiction, or both. *Nashua Savings Bank v. Anglo-American Land, Mortgage, and Agency Co.*, 189 U.S. 221; *Slater v. Mexican National R.R. Co.*, 194 U.S. 120. See also Sommerich and Busch, *The Expert Witness and the Proof of Foreign Law*, 38 Corn. L. Q. 125, 128-30 (1953).

In the *Nashua Savings Bank* case, the court received into evidence copies of what purported to be British corporation statutes to which was attached the deposition of the manager of a British corporation who was also an attorney with thirty years experience. In the *Slater* case, a translation of a Mexican statute was introduced together with the deposition of a Mexican lawyer as to what the statute meant. In *Slater*, the lower court had rejected the deposition under the best evidence rule, but the Supreme Court held that this was error. In light of these cases, the in-

troductio of Commissioner Swartz' deposition in the present case appears proper.

The cases just cited may give the impression that the party who testifies as to the foreign law must himself be an attorney. This is not so. The basic case, repeatedly cited for the proposition that a skilled layman may testify as to foreign law, is the *Sussex Peerage Case*, 11 Cl. & F. 85 (House of Lords, 1844). The *Sussex* case held that a Catholic bishop should be permitted to testify as to the marriage law of the Roman Catholic Church. The holding in the *Sussex* case was discussed with approval in *Ennis v. Smith*, 55 U.S. (14 How.) 399, 427. The most recent United States cases applying the doctrine of the *Sussex* case are *Murphy v. Bankers Commercial Corporation*, 111 F. Supp. 608 (D.C. S.D. N.Y. 1953), and *Eustathiou v. United States*, 154 F. Supp. 515 (D.C. E.D. Va. 1957).

Questions have also been raised as to whether the witness who testifies as to the law of a foreign jurisdiction must be a member of the bar of that jurisdiction, or a resident of the country whose law is involved. The *Sussex*, *Murphy*, and *Eustathiou* cases, cited in the previous paragraph, indicate that the witness need not be a member of the bar, need not have practiced law in the foreign jurisdiction, and need not be a resident of the foreign country involved, provided he is otherwise skilled. Hence, by analogy, there should be no need to show that Commissioner Swartz is an attorney, or has practiced tax law, or been in the Internal Revenue Service—except as a means of demonstrating his skill as an interpreter of Revenue's administrative practices. However, Commissioner Swartz' credibility is certainly strengthened by the Government's demonstration of his long experience with the Revenue Service.



*C. The Files of the Internal Revenue Service Were Thoroughly Searched for Materials Indicating Service Practice.*

The filing system within the Internal Revenue Service will be discussed in detail in Section III, A, of this brief. At that time it will be shown that the file and index system is designed in such a way as to prevent the issuance of rulings which contradict one another in their application to similar facts. Commissioner Swartz' testimony indicates that this system was applied with great thoroughness in the search for rulings pertaining to the issue in the present case. The search "... exhausted all ways and means of locating all correspondence with respect to this particular issue." (Dep. 104.) Not only were the general and precedent files of the Rulings Division searched, but the personal files of specialists within the Rulings Division were also examined as a means of double checking the search of the official files. (Dep. 44.) As a consequence, Commissioner Swartz was able to testify that "If there were any rulings that we don't have that were issued in this area, they would have been issued along the same lines." (Dep. 51.)

*D. Commissioner Swartz was fully Qualified to Testify as to Practice Within the Internal Revenue Service.*

The Government's witness, Mr. Harold T. Swartz, Assistant Commissioner of Internal Revenue (Technical) has extensive experience in the Internal Revenue Service. He has been with the Revenue Service over twenty-six years (Dep. 10) and has risen from Internal Revenue agent to his present position. (Dep. 10.) In 1951, he was appointed Assistant Deputy Commissioner of the Income Tax Unit; in 1952, he became Director of the Tax Rulings Division; and in 1958, he assumed his present position as Assistant

Commissioner (Technical). (Dep. 12-13.) As Assistant Commissioner (Technical), he has charge of the Rulings Division. (Dep. 13.) Consequently, since 1951, Mr. Swartz has been directly associated with the process of issuing rulings in response to taxpayer requests. (Dep. 14.)

Commissioner Swartz' testimony indicates that he possesses very extensive familiarity with both the process of issuing rulings, and with the individuals who have worked within the Rulings Division of the Internal Revenue Service. See, for example, his testimony at page 14 of his deposition and at pages 16-17 where his familiarity with ruling procedure is particularly apparent. In addition, during the course of his testimony, he had frequent occasion to identify the initials of individuals who had written or approved rulings issued by the Internal Revenue Service. (Dep. 49-50, 91, 96, 129-130.) This indicates his familiarity with the individuals who wrote or approved the seven rulings introduced by the Government in the present case, and his knowledge of the procedures followed in issuing those rulings.

**THE DEPOSITION OF MR. SWARTZ AND THE ATTACHED EXHIBITS ESTABLISH WITH REASONABLE CERTAINTY WHAT WOULD HAVE HAPPENED IF ALLSTATE HAD DECIDED TO FILE A CONSOLIDATED RETURN WITH ITS PARENT, SEARS, ROEBUCK & COMPANY, FOR THE FIRST EXCESS PROFITS TAX YEAR**

*A. The Testimony of Commissioner Swartz*

Commissioner Swartz' testimony in his deposition touches on three subjects: The ruling process within the Internal Revenue Service, the ruling index system within the Internal Revenue Service, and the practice of the Internal Revenue Service in connection with the filing of consolidated returns by an affiliated group where one of the affiliates is an insurance company.



In connection with the ruling process in the Internal Revenue Service, Commissioner Swartz stated that rulings are generally issued in response to a request from a taxpayer who wishes to know the tax consequences of a specified transaction. (Dep. 15-16.) He used taxpayer's inquiries as to the tax consequences of a change of accounting periods as a means of showing how the ruling process works. (Dep. 17.) He pointed out that the main function of a ruling is to advise the taxpayer as to the tax result which he can expect if he consummates a transaction, such as a change in accounting period, in the way outlined in his request for a ruling. (Dep. 17.) Commissioner Swartz stated that between 30,000 and 40,000 requests for rulings are received by the Revenue Service each year. (Dep. 16.)

The bulk of Commissioner Swartz' testimony concerned the methods of indexing and filing rulings so as to facilitate retrieval of the information which they contain. This testimony as to the Service's methods of information retrieval is important because it demonstrates that a system exists within the Revenue Service which assures that all requests for rulings based on similar facts are answered in the same way.

The ruling files within the Internal Revenue Service are of three types: general files, precedent files, and personal work files. No ruling files exist in any other office. (Dep. 98.) Copies of all issued rulings are placed in either the general files or the precedent files. (Dep. 15, 35.) The general files contain rulings which are not considered to have precedential value. (Dep. 22.) The rulings in the general files are indexed in broad categories. (Dep. 22, 35.) The broad category for rulings of the kind involved in the present suit is "Consolidated Returns." (Dep. 107.) The Service's precedent files will be discussed in greater detail below; their purpose, as the name implies, is to index

those rulings which are considered to have precedential value, as contrasted with those rulings which are placed in the general file. (Dep. 70.) Finally, each individual specialist keeps copies of rulings which he has prepared. (Dep. 35.) These personal files are passed on to the specialist's successor when the specialist retires or goes to some other branch of the Internal Revenue Service. (Dep. 105.) The rulings contained in a specialist's personal files, of course, duplicate the contents of the general and precedent files, since the general and precedent files are complete, official files, while the personal files contain only material of particular interest to the individual specialist. (Dep. 44-45, 35-36.) Service practice is ascertained by a study of the general and the precedent files. (Dep. 194.) An examination of a specialist's personal files is made only as a means of double checking the results of a search of the official files. (Dep. 35, 44.)

The practice of keeping a precedent file came into existence at some time prior to 1943, probably long before 1943. (Dep. 86.) The precedent files are currently maintained within the Technical Organization headed by Commissioner Swartz. (Dep. 13, 15, 69.) These files contain rulings which, in the opinion of classification personnel, establish a precedent to be followed in issuing later rulings. (Dep. 22, 70.) Materials are often selected for inclusion in the precedent files because they have been reviewed by and received the approval of the office of the Commissioner of Internal Revenue and the Chief Counsel's office. (Dep. 49, 187.) The purpose of the precedent file is to separate those few rulings which establish precedents from the many which do not. (Dep. 70.) Before a new ruling is issued, individuals working in the Rulings Division check the precedent file to ascertain the Internal Revenue Ser-

vice's position on the issues involved in the request on which they are working. (Dep. 33, 48.) Materials in the precedent file are indexed both by name of case and by precedent, unlike the materials in the general files which are indexed only under broad categories. (Dep. 35.)

The indexing system of the precedent files is designed to insure that new rulings based on facts similar to those involved in prior rulings receive identical answers. (Dep. 48.) The indexing system makes it highly unlikely that any ruling could be issued on the subject involved in the present suit which took a position contrary to that shown in defendant's exhibits 1 through 7. (Dep. 48.) *The reason for this is that if a ruling in the precedent file is superseded, it is removed from the precedent file and placed in the general file.* (Dep. 48, 185-186.) As a result of this procedure, Commissioner Swartz was able to testify unequivocally that no one in the Income Tax Unit could have issued a ruling contrary to the rulings contained in the precedent file. (Dep. 50-51.) This testimony indicates that the precedent file system insures that similar positions are taken by the Revenue Service on similar facts.

Commissioner Swartz testified at considerable length about the use of Confidential Unpublished Rulings (CUR's) within the Internal Revenue Service. (Dep. 57-9, 99-103.) This testimony is important because defendant's exhibit 2, the ruling letter of May 26, 1945, was circulated to the field as a Confidential Unpublished Ruling. (Dep. 93.) These Confidential Unpublished Rulings are documents which are sent to the field to provide guidance for Internal Revenue agents. (Dep. 102-103.) These rulings are not cited by name, because the Internal Revenue Service has a long-established policy of keeping secret the names of taxpayers who request rulings. (Dep. 100.) These Confidential Unpublished Rulings are important to the

revenue agents in the field because they constitute a useful research tool. (Dep. 103, 187.) CUR's are indexed in Internal Revenue Service field offices by use of a card index. (Dep. 189.) This index is available to reviewers, revenue agents, and conferees. (Dep. 190.)

Although the bulk of Commissioner Swartz' testimony concerns the filing and index system just discussed, the Commissioner also testified as to what that system had produced as to Revenue Service practice in dealing with affiliated corporate taxpayers, one of which is an insurance company, when the affiliated group wishes to file a consolidated return. The pertinent Revenue practice originated as a result of an apparent conflict in the regulations. (Dep. 157, 159, 176-178.) This apparent conflict arose because the Code required insurance companies to file their returns on a calendar year basis, while the regulations permitted the filing of consolidated returns by parents and subsidiaries. In situations in which a parent on a fiscal year basis owned or acquired an insurance company subsidiary, the provisions of the regulations appeared to make it impossible to file a consolidated tax return.

Commissioner Swartz testified that the Revenue Service might have adopted a "hard-nosed position" which would have denied anyone the privilege of filing a consolidated return in this situation. (Dep. 178.) However, he pointed out that the Commissioner had, instead, found an "administrative way" of allowing parent corporations with insurance company subsidiaries to file consolidated returns. (Dep. 178, 46-47, 74-75, 126.) Commissioner Swartz also described how this practice had been implemented by means of income tax returns filed for "short accounting periods." (Dep. 127, 148-149, 183-184.) The purpose of these short accounting period returns was to put both parent and subsidiary on a calendar year accounting basis.



*B. An Analysis of the Rulings Contained in Defendant's Exhibits 1 through 7.*

The Government's position is that the rulings contained in Exhibits 1 through 7 speak for themselves. However, it may be useful to refer to some of Commissioner Swartz' statements as to what these rulings hold, and to briefly summarize each of these rulings for ready reference.

Commissioner Swartz' testimony pointed out that the subject matter of these rulings is the filing of consolidated returns by an affiliated group where one of the affiliates is an insurance company. (Dep. 34, 37, 39, 107.) He also stated specifically the holding of the ruling contained in Defendant's Exhibit 1 (Dep. 74-75) and Defendant's Exhibit 2 (Dep. 87-88, 92.) The substance of the Commissioner's statements is that the rulings hold that Internal Revenue Service practice permits the filing of consolidated returns by a corporate parent if it takes action to change its accounting period to correspond with that of its insurance company subsidiary.

A brief discussion of each of these ruling letters follows:

(1) Defendant's Exhibit 1 is a ruling dated February 14, 1944. It is discussed at pages 20 and 21 of Commissioner Swartz' deposition and again at pages 74 and 75. It is contained in the Internal Revenue Service's precedent file. This ruling deals with a situation in which an insurance company had been allowed to change to a fiscal year basis in 1941 for the purpose of filing consolidated returns with its parent. In this ruling the Internal Revenue Service states that the insurance company should not have been allowed to file on a fiscal year basis and that it must return to a calendar year basis. Permission to continue to file consolidated returns was granted, provided the entire

group changed to a calendar year basis. The Service agreed to accept consolidated fiscal year returns and consolidated short period returns while this changeover was being made.

(2) Defendant's Exhibit 2 is a ruling dated May 26, 1945. It is contained in the Revenue Service's precedent file and is discussed in Commissioner Swartz' deposition at pages 22-24, 87-88, and 92. In this instance, a parent corporation which filed on a fiscal year basis expected to acquire an insurance company subsidiary in July 1945. It requested information as to how they could file consolidated returns for the last six months of 1945. The Internal Revenue Service ruled that, if the parent company shifted to a calendar year accounting basis and submitted a short period return, a consolidated return could be filed with the insurance company subsidiary for 1945. This ruling became Confidential Unpublished Ruling 1661.

(3) Defendant's Exhibit 3 is a ruling dated September 12, 1945. It is contained in the Internal Revenue Service's general file, and it is discussed at pages 24-25 of Commissioner Swartz' deposition. In this instance, a corporation which owned an insurance company subsidiary requested permission to file a consolidated return on a fiscal year basis. The Service ruled that it could not allow a permanent shift to a fiscal year basis by an insurance company.

(4) Defendant's Exhibit 4 is a ruling letter dated February 5, 1947. It is contained in the precedent file and is discussed at pages 25-28 and pages 119-120 of Commissioner Swartz' deposition. In this instance, a corporation which acquired ownership of an insurance company in July of 1946 wished to file consolidated returns for the last six months of 1946 and all subsequent periods. The



Internal Revenue Service ruled that such returns could be filed if the corporation and its insurance subsidiary changed to a calendar year basis, effective December 31, 1946. The ruling also outlines the "short period return procedure" to be followed in making this shift of accounting period and allows submission of consolidated fiscal year returns during the changeover period.

(5) Defendant's Exhibit 5 is a ruling dated August 21, 1951. It is contained in the Internal Revenue Service's general file and is discussed at pages 28-30 of Commissioner Swartz' deposition. In this instance, the parent corporation wished to file a consolidated return for excess profits tax purposes with its insurance company subsidiary for the last four months of 1949 and all subsequent periods. The Internal Revenue Service ruled that such returns could be filed if the insurance company amended its returns for prior periods and filed appropriate short period returns, and if the parent corporation and its other subsidiaries changed to a calendar year basis effective December 31, 1951. Submission of consolidated fiscal year returns for prior periods was allowed.

It is important to note that this ruling letter states that "... it has been the policy of the Bureau in cases of this kind to permit the filing of the first consolidated return upon the basis of the fiscal year of the common parent. . . ." (Ruling letter, p. 2.) [Emphasis added.] It is submitted that this quotation is determinative of the existence of an established practice within the Internal Revenue Service.

(6) Defendant's Exhibit 6 is a ruling dated May 22, 1953. It is contained in the Internal Revenue Service's general files and is discussed at pages 30 and 31 of Commissioner Swartz' deposition. Here, a parent company which had acquired an insurance subsidiary in 1945 wished

to file a consolidated return with its subsidiary at the earliest possible time. The Revenue Service ruled that a consolidated return could be filed for all periods subsequent to May 31, 1952, if the parent corporation changed to a calendar year accounting basis, and if appropriate "short period returns" were filed. Permission to file a consolidated fiscal year return for the year ending May 31, 1953, was granted.

(7) Defendant's Exhibit 7 is a ruling dated January 18, 1956. It is contained in the Revenue Service's precedent file, and is discussed at pages 31-34 of Commissioner Swartz' deposition. In this instance, the corporate parent acquired an insurance company subsidiary on January 1, 1955. Information was requested as to how to file a consolidated return for the year 1955. The Internal Revenue Service ruled that a consolidated return could be filed if the parent shifted to a calendar year basis and filed appropriate short period returns. Permission to file a consolidated fiscal year return for the year ending September 30, 1955, was granted.

These seven rulings, taken together, indicate that it has been the practice of the Revenue Service since 1944 to permit the filing of consolidated returns by parent corporations which own insurance company subsidiaries, and, further, that in instances when this has necessitated a shift of accounting periods the Service has consistently followed the practice of allowing the very first consolidated return to be made on the fiscal year of the parent, provided that subsequent action was taken to shift both the parent and its subsidiaries to a calendar year basis.

*C. Rulings Issued After December 31, 1950, Are Relevant To the Decision of this Case.*

Evidence as to a course of conduct may be shown by reference to events which occur after a transaction is completed rather than solely by transactions or occurrences

prior to or during the period in question. As the Court pointed out at the last hearing, it is quite possible, for example, to prove membership of a person in a particular party or group by showing conduct prior to the critical date and conduct subsequent to that date even though there may be a complete hiatus during the critical period. (Tr. Jan. 11, 1962, pp. 39-40.)

Nor is such a method of proof unknown in the tax field. Mertens in his treatise on Federal Taxation makes the point clear in connection with determining the nature of real estate transactions.

The facts consequently are open to examination not only for the particular tax years in issue, but also for years prior and subsequent to the years in issue. (3B Mertens, Law of Federal Income Taxation (Rev.), Sec. 22.138 at p. 625.)

The holding in *Ehrman v. Commissioner*, 120 F. 2d 607, 610 (C.A. 9) is to the same effect.

The doctrine just discussed indicates that the testimony of Commissioner Swartz as to the practice of the Internal Revenue Service during periods subsequent to December 31, 1950, is relevant to a decision of the issues in this case. Certainly, if the Revenue Service is shown to have followed a particular practice both before and after a given date, it is inherently likely that it followed that practice on the date in question. This is especially true when evidence, such as defendant's exhibit 5, indicates practice during the precise period under examination in the present case. However, defendant's exhibits 6 and 7, which relate to later periods, are also relevant in light of the principles discussed above because they show that no change took place to disturb the unvarying administrative practice within the Internal Revenue Service instituted in 1944 and consistently applied from that time forward and that it was accepted as a practice by the Service.

## SUMMARY

The Government has shown by use of documentary evidence and expert testimony that an unpublished administrative practice existed within the Internal Revenue Service from 1944 to 1956 under which the Allstate Insurance Company could have filed consolidated excess profits tax returns with its parent, Sears, Roebuck and Company, had Allstate wished to do so. The methods used to prove the existence of this practice have been shown to be proper in light of the techniques used to prove similar questions of fact in other cases.

The proof of administrative practice offered by the Government establishes with reasonable certainty that, had Allstate Insurance chosen to request permission to file a consolidated excess profits tax return with Sears, Roebuck and Company at any time from 1944 onward, permission to do so would have been granted by the Internal Revenue Service. Because Allstate could have filed such a return, it is ineligible for the special "growth credit" provided by Section 435(c)(1)(A)(i) of the Korean War Excess Profits Tax Law as an aid to the expansion of small corporate enterprises.

Respectfully submitted,  
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February, 1962.

## AFFIDAVIT OF MAILING

State of Illinois, County of Cook—ss.

Bruno W. Tabis, Being first duly sworn, on oath deposes and says that he is employed in the Office of the United States Attorney for the Northern District of Illinois; that on the 5th day of February, 1962, he placed a copy of:

BRIEF FOR THE DEFENDANT IN SUPPORT  
OF ITS PROOF OF ADMINISTRATIVE  
PRACTICE 60 C 322

(Allstate Insurance Co. v. United States)

in a Government franked envelope addressed to:

Charles W. Davis, Esq.

Hopkins, Sutter, Owen, Mulroy & Wentz

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Chicago, Illinois

and that he placed said envelope in the United States mail chute located in the United States Court House, Chicago, Illinois, on said date at the hour of about 5:00 P. M.

/s/ Bruno W. Tabis

Subscribed and Sworn to before me,  
this 5th day of February, 1961.

/s/ Steve Balyar

Notary Public

SUPPLEMENTAL BRIEF FOR THE DEFENDANT  
IN SUPPORT OF ITS PROOF OF  
ADMINISTRATIVE PRACTICE

INTRODUCTION

Because the present proceedings have become so complicated, it may be useful at this time to recapitulate for the Court the basic issue involved in this case, so that the crux of this dispute does not become lost in a welter of briefs.

In enacting the Korean War Excess Tax Act of 1950, c. 1199, 64 Stat. 1137, Congress provided a special credit for small companies which had experienced unusual growth in the period after World War II. Sec. 435(e). However, if a company had total assets of more than \$20,000,000, it was ineligible for this special growth credit. Sec. 435(e)(1)(A)(i). In order to prevent large affiliated corporate groups with small subsidiaries from improperly taking advantage of the "growth credit", Congress required that any affiliated group of companies which could file a consolidated income tax return was not to be eligible for the "growth credit" if the total assets of the affiliated group exceeded \$20,000,000.

*There can be no question whatsoever that if Allstate had been an ordinary business corporation rather than an insurance company, it could have filed a consolidated return with its giant parent, Sears Roebuck & Company. Allstate would, under those circumstances, be ineligible for the "growth credit" which it now requests. Hence, Allstate's claim that it is eligible for the "growth credit" is founded entirely upon the fact that it is an insurance company which was required to file calendar year tax returns. Because this calendar year filing requirement exists, Allstate claims that it could not have filed a consolidated return with its gigantic corporate parent, Sears,*



and that it is, therefore, eligible for the "growth credit". In effect, Allstate is arguing that Congress must have intended the test of eligibility for the "growth credit" to apply generally to affiliated groups of companies but not to Allstate-Sears because of Allstate's insurance company status. There is no justification in the statute or its legislative history for the creation of a technical exception of this sort.

In any event, the Government now seeks to show that, under an existing practice within the Internal Revenue Service, even Allstate could have filed a consolidated return with its parent, Sears. This being so, Allstate, like all other subsidiaries of giant parent corporations, must pay its Korean excess profits taxes at the normal rates.

#### IMMEDIATE ISSUE INVOLVED

Throughout its brief, the taxpayer insists that the "only question" involved in the present exchange of briefs "is whether Sears and Allstate had the privilege of filing a consolidated return for the taxable year ended December 31, 1950". See, for example, Br. 16, 19, 56. Since this is a serious misconstruction of the issues here involved, a short discussion of this matter seems appropriate.

The Government seeks to show that, as a result of an established practice in the Internal Revenue Service, Allstate-Sears could have requested permission to file a consolidated income tax return at any time after February 1944, and that, if requested, such permission would have been granted provided that appropriate short period returns were filed. Consolidated calendar year returns could have been filed thereafter.

The Government also seeks to show that, as a result of the same administrative practice in the Service, Allstate-Sears could have requested permission to file a consolidated return immediately after the passage of the Korean War Excess Profits Tax Act, *had they wished to do so, and*

*that permission would have been granted to file a consolidated fiscal year return for Sears' fiscal year ending January 31, 1951, provided that Sears-Allstate then filed a consolidated short period return for the remainder of 1951 and that Allstate filed a separate short period return for January 1950.* The Government has attached a chart appendix to this brief; Chart VIII diagrams the procedure just described.

In short, the question presented in this exchange of briefs concerns the existence of an administrative practice in the Internal Revenue Service from 1944 onward, not exclusively whether Allstate-Sears had a "privilege" on December 31, 1950. As Government counsel pointed out in argument (Tr. January 11, 1962, pp. 45, 55-9), there appears to be a difference between the parties as to whether the term "privilege" appearing in Sec. 435(e)(1)(A)(i) of the Korean War Excess Profits Tax Act means "absolute right" or "opportunity". This is obviously a statutory construction problem. In its present brief, the taxpayer has repeatedly attempted to introduce a discussion of this statutory construction problem. A discussion of this question is, of course, important to a determination of this case. However, the present briefs were to be directed solely to the question of the Government's proof of administrative practice within the Internal Revenue Service. (Tr. January 11, 1962, pp. 67-71.) To inject at this time questions which have been reserved for argument at a later date can only be interpreted as an attempt to confuse the issues and influence the thinking of the Court before the proper opportunity for legal argument appears.

Repeated attempts by the taxpayer to argue that he did not know about the practice in question (Pltf. Br. pp. 17-18, 20, 23, 71-72, 74) are also irrelevant to a decision

of the issue now before this Court, because the Government has introduced proof of the Service's administrative practice only to show what Allstate *could have done if they had wanted to*, not what Allstate-Sears wanted to do or was required to do. To make the same point another way, because Sec. 435(e)(1)(A)(i) of the Korean War Excess Profits Tax Act is couched in hypothetical terms, taxpayer's reliance is not an issue in this case and cannot be.

For its part, the Government will confine its remarks in this brief solely to the question of the Government's proof of administrative practice and how this proof fits in with the provisions of Sec. 435(e)(1)(A)(i) of the Korean War Excess Profits Tax Act.

# I

COMMISSIONER SWARTZ'S DEPOSITION SHOWS THAT ALLSTATE-SEARS COULD HAVE FILED A CONSOLIDATED RETURN AT ANY TIME SUBSEQUENT TO 1944

A brief statement may be helpful at this point to outline what the Government believes Assistant Commissioner Swartz' deposition shows as to how Allstate-Sears could have filed a consolidated return.

It is the Government's view that the deposition of Assistant Commissioner Swartz and the attached exhibits clearly indicate that, if Allstate-Sears had requested permission to file a consolidated return at any time subsequent to the year 1944, they would have been granted permission to do so under the procedures outlined in the deposition and in those exhibits. The mechanics of the changeover would have been relatively simple. *Allstate could have filed a consolidated fiscal year return with Sears* and both companies would then have filed a consolidated short period return to place them on a calendar year basis. Both companies could have continued to file consolidated calendar year returns thereafter. This pro-

cedure as applied to the year 1951 is outlined in Chart VIII, attached to this brief.<sup>1</sup>

Allstate-Sears, however, seeks to advance a disappearing privilege theory. While it is incontrovertible that the taxpayer had the opportunity to file a consolidated return at any time subsequent to 1944, it argues in its brief that this privilege mysteriously disappeared in the year 1950. (Pltf. Br. 38, 40, 63.) It bases this "disappearing privilege argument" on the fact that Allstate-Sears took no action in 1950 to file a consolidated return. But this fact does not mean that the opportunity to file a consolidated return evaporated in that year. Assistant Commissioner Swartz' deposition and the attached exhibits show that the opportunity to file such a return had existed since 1944, *even though it was never utilized by Allstate-Sears, and even though it was unlikely to try to use that opportunity*. Again, the Government wishes to emphasize that the point

<sup>1</sup> In its brief (pp. 20, 38, 44, 55) the taxpayer apparently concedes that, had Allstate-Sears applied to file a consolidated return at any time prior to November 1, 1950, permission "might have been granted". And, "if so, a consolidated return could have been filed for the short taxable period from February 1, 1950, through December 31, 1950". (Pltf. Br. 55.) (For a schematic presentation of this concession, see the *alternative* method in Chart VIII.) In the Government's view, this concession should decide the issue before the Court at the present time because this concession means that Allstate-Sears could have filed a consolidated return for the first taxable year ending after June 30, 1950.

The taxpayer may contend that it had no reason to file such a consolidated return, but this fact is of absolutely no importance here, since the question before the Court is not whether the taxpayer wished to file such a return or thought of filing such a return, but rather whether the taxpayer *could have* filed such a return had it chosen to do so. The taxpayer's concession describes one way in which a consolidated return could have been filed.



is *not* what the taxpayer wanted to do, but the hypothetical question what it *could have done* if it had wanted to.

But let us assume, *arguendo*, in spite of the Commissioner's practice since 1944, and in spite of the taxpayer's concession discussed in footnote 1, below, that Allstate-Sears was unable to begin to file consolidated calendar year returns at any time between 1944 and January 3, 1951, the date of enactment of the Korean War Excess Profits Tax Act. Even if we make this assumption, the fact still remains that Allstate-Sears could have begun to file consolidated returns as of the close of January 1951. The truth of this statement will become more apparent in connection with the discussion of Defendant's Exhibits 1, 4, 5, 6, and 7, below. However, a short examination of the mechanics of the possible filing procedure is in order at this time. Sears' first taxable year ending after June 30, 1950, came to an end on January 31, 1951. The proven practice shows that Allstate-Sears could have filed a consolidated return by including Allstate's income along with Sears' in a consolidated return for the fiscal year ending January 31, 1951. Allstate would then have filed a separate amended return for the month of January 1950 and both Sears and Allstate would have filed a consolidated short period return for the last eleven months of 1951. Thereafter, they would have filed consolidated calendar year returns. See Chart VIII attached to this brief for a diagram of this procedure. Allstate *need not have given advance notice of its intention to file a consolidated return with Sears on Sears' taxable year* since such notice is not required when a subsidiary conforms its fiscal year to that of its parent. Sec. 24.14(b), Treasury Regulations 129 (1939 Code). However, the advance notice provisions would, of course, apply to the change of Allstate-Sears to a calendar year basis as of December 31, 1951.

## II

### TAXPAYER'S ALLEGED LACK OF KNOWLEDGE OF THE COMMISSIONER'S ADMINISTRATIVE PRACTICE IS NOT RELEVANT TO A DECISION OF THE ISSUES BEFORE THIS COURT

Throughout its brief, the taxpayer repeatedly speaks as if there were some reliance interest of Allstate-Sears which is jeopardized by the Government's effort to prove the existence of an unpublished administrative practice within the Internal Revenue Service. For example, the taxpayer argues that publication of the administrative practice under consideration at the present time should have been required (Pltf. Br. 17, 18, 20, 74.) But publication or the lack of it would be pertinent only if Allstate-Sears' *knowledge* of this practice were in some way pertinent to a decision of the issues in this case. But the question in the view of the Government is *not* whether Sears or Allstate knew about or acted in reliance on the administrative practice under examination; *the pertinent question is whether such a practice existed* and whether and when a consolidated return could have been filed. Hence, the taxpayer's repeated attempts to introduce the question of publication into these briefs is misleading to the Court.

The absurdity of the taxpayer's complaints regarding the matter of publication is pointed up with particular clarity when one asks how the actions of Allstate-Sears would have differed in the years 1950 and 1951 had this administrative practice appeared in published form. It is most doubtful indeed that either Sears or Allstate would have acted differently had it known of the existence of the practice, because neither firm was likely to want to incur the additional 2% tax which must be paid when a consolidated return is filed. Sec. 141(c), 1939 Code.<sup>2</sup> Hence,

<sup>2</sup>As amended by Sec. 159(a), Revenue Act of 1942, c. 619, 56 Stat. 798.



there is no way in which the lack of publication of the administrative practice here in question can be said to have influenced Allstate-Sears to its detriment. This argument is solely an attempt to obscure the issues before the Court.

In a similar vein, the taxpayer contends that what Allstate-Sears might or might not have done subsequent to the time that the Korean War Excess Profits Tax became law on January 3, 1951, should affect the Court's decision as to whether there existed an administrative practice within the Internal Revenue Service under which a consolidated return could have been filed. But to argue in this way is simply to insert confusions into this case. Allstate-Sears did not have any greater reason to file a consolidated income tax return after the passage of the Korean War Excess Profits Tax Act than it did before that Act became law. The corporate group had the same opportunity to file such a return before and after the passage of the Act. The knowledge that the Act had passed did not affect the taxpayer's actions on the filing or non-filing of consolidated returns, nor did it change the fact that ever since 1944 the taxpayer could have filed such returns had it chosen to do so. Hence, the taxpayer merely confuses the issue when it argues that, as of the date of the passage of the Korean Excess Profits Tax Act, it was too late to file a consolidated return for 1950. This is an erroneous argument in the first place, since Allstate-Sears could have filed a consolidated fiscal year return on January 31, 1951, but, even if the argument were not erroneous, it is still needless since the fact that Allstate-Sears took no steps to file a consolidated return does not change the fact that *an administrative practice existed under which they could have filed a consolidated return had they chosen to do so.*

### III

#### REPLY TO TAXPAYER'S ARGUMENT I

##### A. Taxpayer's Argument I A

In the first paragraph of argument heading I A, the taxpayer states that Assistant Commissioner Swartz never had occasion to define the term "administrative practice". The taxpayer therefore concludes that there is no precedent showing how to prove administrative practice within the Internal Revenue Service. This argument is certainly a non-sequitur. Even a glance at a treatise such as Davis's Administrative Law or at the Administrative Procedure Act (5 U.S.C. 1952 ed., Sec. 1001), c. 324, 60 Stat. 137, will indicate that terminology in administrative law is by no means uniform. The fact that Assistant Commissioner Swartz had not had occasion to define a given administrative law term means nothing, as Assistant Commissioner Swartz pointed out immediately after being asked whether he had ever had occasion to define administrative practice. He said (Dep. 182-183):

This is what the Internal Revenue Service has been doing. It has been their procedure, their policy, their position. Practice is as good a word, as far as I know. The practice has been to issue rulings along this line and there has not been any change in that practice.

The taxpayer further confuses the issue by referring to the statement in the Government's brief (p. 7) that "there is little precedent with respect to methods of proving unpublished administrative practice within the Internal Revenue Service". Any reasonable reading of the Government's brief would surely have indicated that the Government there referred to *legal* precedents, not to the state of Assistant Commissioner Swartz's understanding of the terminology of administrative law.

In any event, the taxpayer has not dealt with the arguments developed by the Government with respect to methods of proving unpublished administrative practice

within the Internal Revenue Service, except to say that it finds them "astounding". (Br. p. 22.) But it is not enough simply to cast aspersions on the Government's method of proving Service policy. One might ask how, if the Government's method of proof is insufficient, one does prove an unpublished policy.

It would certainly be wrong to say that such unpublished policies can never be proved in a court of law, because eminent authorities on federal taxation have pointed out that unpublished Service practice may often be crucial to the resolution of a tax problem. For example, Mr. Erwin Griswold, now Dean of the Harvard Law School, has stated unequivocally that "Treasury construction and practice \*\*\* may even appear, and quite plainly, in certain types of cases, *where no public ruling has been issued at all*". Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 417 (1941). (Emphasis added.) The Dean then goes on to say (Op. Ct. p. 418):

Where the practice clearly appears, and where it has in fact been long continued, it should be given effect in the interests of sound tax administration. There should be no rule limiting the effect of administrative construction in all cases to formal regulations and Treasury decisions.

After mentioning that he has not forgotten the statement in the Cumulative Bulletins that the Treasury does not consider itself bound even by published rulings, the Dean succinctly summarizes his views on the importance of Service practice (54 Harv. L. Rev. 398, 418, n. 60):

Bureau [Service] practice is Bureau practice, and when it clearly appears and has been long continued, it should be given effect regardless of the form in which it appears.

#### B. *Taxpayer's Argument I B*

Taxpayer's argument I B indicates that it either has not understood or wishes to confuse the essential legal

issues involved in the present exchange of briefs. After a short review of the procedure by which the Revenue Service issues rulings, the taxpayer states (Br. 24) that "It is significant that only the taxpayer who actually requests and receives the ruling may rely on it \* \* \*." But the taxpayer completely fails to show why this is "significant". The Government submits that, as outlined earlier, the question of reliance is completely irrelevant to a decision of the issue before the Court at the present time, *viz.*, whether the Government has shown the existence of an administrative practice within the Internal Revenue Service under which Allstate-Sears could have filed a consolidated tax return. It is not important to determine whether or not Allstate-Sears knew of the Service's practice or whether or not it relied on the practice. The only question presently before the Court is whether such a practice did in fact exist. It confuses the issues needlessly to enter, as the taxpayer does, into a long discussion as to whether taxpayers can rely on rulings issued to other parties.

#### C. *Taxpayer's Argument I C*

At page 26 of its brief, the taxpayer, in the course of a discussion of the files in the Tax Rulings Division of the Internal Revenue Service, seeks to give the impression that the Commissioner sometimes changes his mind on a ruling even though the facts, law, or Regulations have not changed. But the taxpayer fails to point out that no such changes have occurred since 1944 in connection with the rulings which are pertinent to a decision of the issue currently before this Court. Since the issuance of the ruling letter dated February 14, 1944, the Revenue Service has consistently held that a corporate parent which wishes to file a consolidated return with an insurance subsidiary may do so by filing appropriate consolidated fiscal year and short period returns in order to make the changeover. Had there been any variation in the Service's practice in



this regard, that variation would have been indicated in the Service's Precedent File. (Dep. 179.)

Later in this same discussion, the taxpayer "assumed" that, because it would have been physically impossible to read through all the material contained in the Service's general consolidated return file, this file is "nothing more than a temporary catchall depository". (Pltf. Br. 27.) This assumption on the part of the taxpayer is not warranted by any facts discussed in Assistant Commissioner Swartz's deposition, least of all by the physical impossibility of reviewing all the material in those files. Note, in particular, Commissioner Swartz' testimony (Dep. 34-35) regarding the Service's file index system.

#### *D. Taxpayer's Argument I D*

In this argument heading, the taxpayer protests that Assistant Commissioner Swartz did not make the file search for Government Exhibits 1 through 7 himself but, instead, asked one of his Senior Technical Advisors, Mr. Levine, to make the actual search. However, the taxpayer fails to show why a high Government official should have to make a file search personally. No one would expect a high corporate official to personally search his company's files for records which are in his custody and which a court wishes to examine; similarly, it is absurd to carp because a high Government official allowed a trusted subordinate to act on his behalf in searching files.

The taxpayer also complains that Assistant Commissioner Swartz gave Mr. Levine no specific instructions as to how this search should be made. But the taxpayer has failed to show why such instructions were needed. There has been no claim that Mr. Levine was incompetent, inexperienced, untrustworthy, or otherwise unequipped to make a search of the files and, in the absence of such a showing, the taxpayer cannot validly argue that Mr. Levine needed detailed instructions as to how to search through a set of files with which he was thoroughly familiar.

The taxpayer also attempts to multiply the issues before the Court by alleging that Assistant Commissioner Swartz' testimony as to the file search is hearsay. But to argue in this way is to miss the point that Assistant Commissioner Swartz is the official custodian of the files in question. The Assistant Commissioner may not have stood beside Mr. Levine and watched each step of the file search, but, as official custodian, he was certainly familiar with the way in which searches of his files were conducted in this and other instances. His experience and record with the Internal Revenue Service (Dep. 10-15) and the competence of his subsequent testimony leave little room for argument that he was unfamiliar with these matters. To argue that a busy official such as Assistant Commissioner Swartz should have stood idly by and watched a file search being conducted by a subordinate is even more outrageous than to argue that he erred in allowing a subordinate to search the files in the first place.

The taxpayer next seeks to attack the effectiveness of the Service's filing system on the ground that it failed to produce the ruling letter dated February 14, 1944, in time for the execution of the affidavit submitted by Assistant Commissioner Swartz earlier in the proceedings in the present case. The taxpayer conveniently overlooks Assistant Commissioner Swartz's testimony (Dep. 44-48, 50-51) which shows that, even if the Court does not have before it every ruling letter ever issued on the subject now at issue, it can rest reasonably assured that there are no outstanding rulings contrary to those presently before it. Assistant Commissioner Swartz' testimony in this regard is worth quoting (Dep. 50-51):

No one in the Income Tax Unit could have issued a ruling different or contrary or taken a different position than that letter without again having to refer this difference of a position back to the Chief Counsel or the Commissioner's Office, and at that point had any position been changed in this matter the file would



have been removed from the Precedent File, and since the file still remained in the Precedent File and is still in the Precedent File it is an indication certainly that there is no probability that any contrary ruling was issued.

*If there were any rulings that we don't have that were issued in this area, they would have been issued along the same lines. (Emphasis added.)*

The conclusion that any unlocated rulings follow the principles outlined in the rulings presently before the Court is further borne out by the fact that there has been considerable continuity in the Service personnel who have handled the consolidated return problem. Between 1944 and the present time, only six people have worked in the Rulings Division as experts on consolidated returns (Dep. 106), and two of these six, Mr. Earl C. Heft and Mr. David Deutsch, have written all the rulings now before the Court, save the 1944 ruling. Five of the rulings were either written or reviewed by Mr. Heft. The issuance of aberrant rulings is therefore most unlikely.

The taxpayer concludes (Br. 30) by stating that "there are simply too many opportunities for error" in the Service's filing system and that, as a consequence, it is impossible for the Commissioner to maintain a consistent position on a particular subject. But the fact of the matter is that the Commissioner *has* maintained a consistent position on the consolidated return issue now before the Court for a period of more than 18 years, through changes of administration, reorganizations of the Internal Revenue Service, and reenactments of the provisions in the Internal Revenue Code. A filing system which, in spite of such changes, can maintain continuity of Service position in this fashion is certainly not defective.

The reason for the taxpayer's difficulties in understanding this point is that the taxpayer has not grasped, or chooses to ignore, the crucial significance of the Precedent

Files. The fact is that the materials in those files are supposed to be checked, and are checked, by Service personnel before writing a ruling letter (Dep. 33, 48), and that superseded materials are removed from those files when they become outdated or overruled (Dep. 48, 185-186).

#### E. Taxpayer's Argument I E

In this argument the taxpayer advances the view that there are so many contingencies involved in the Service's ruling process that it is uncertain that the Commissioner can maintain continuity of position in answering requests for rulings. (Pltf. Br. 31.) However, an examination of the facts presently before the Court clearly indicates that most of the taxpayer's alleged contingencies are fanciful. This can be illustrated most usefully by means of a diagram:

##### Plaintiff's Alleged Contingency

If a ruling is selected for inclusion in the Precedent File \* \* \*

If a subsequent request for ruling presents an identical or substantially similar fact situation \* \* \*

If the law and Regulations have not changed \* \* \*

If the author of the current ruling checks the Precedent File \* \* \*

If he approves the reasoning of the prior ruling \* \* \*

##### The Facts

Defendant's Exhibits 1, 2, 4, and 7 were placed in the precedent file. (Dep. 21, 23, 26, 32-33.)

A request from All-state-Sears would have presented a fact situation absolutely indistinguishable from that shown in Government Exhibit 5 and substantially similar to the situation shown in the other exhibits.

Taxpayer does not even urge that there was a material change of the pertinent law or Regulations from 1944 onward.

It is the duty of ruling personnel to do so. (Dep. 33, 48.) There has been no proof of administrative irregularity.

Since 1944, no prior ruling has been disapproved. (Pltf. Ex. C; Dep. 47-48, 50-51.)

In addition to the concocted character of the "contingencies" just discussed, it is worth remembering the fact, discussed earlier, that Government Exhibits 1 through 7, Assistant Commissioner Swartz's deposition, and today's Regulations show that continuity of position has been maintained by the Revenue Service in this area for more than 18 years.<sup>3</sup> In the years from 1944 through 1956, this continuity of position was maintained with the aid of the filing system which the taxpayer now finds so fraught with error. If the taxpayer's fancied contingencies had existed in fact, the Internal Revenue Service might not have been able to maintain a consistent position on this subject over a period of almost two decades.

<sup>3</sup> It may be helpful to the Court to quote the present Regulations on this subject in full, since they succinctly state the policy first enunciated in 1944 in Government Exhibit 1 and consistently applied from that time forward. Section 1.502-14(c) of Treasury Regulations on Income Tax (1954 Code) reads as follows:

SEC. 1.502-14 [as amended by T. D. 6412, 1959-2 Cum. Bull. 199] *Accounting Period of an Affiliated Group.*—

\* \* \*

(c) If the common parent-corporation of an affiliated group has a fiscal year accounting period and any member of the group is an includible insurance company required by section 843 to file its return on a calendar year, *the first consolidated return which includes such insurance company may be filed on the basis of the fiscal year accounting period of the common parent*, provided, however, the common parent and the other includible corporations change to a calendar year basis effective immediately after the close of such fiscal year. For this purpose, Form 1128 shall be submitted at or before the time such first consolidated return is filed. (Emphasis added.)

In connection with the publication of this regulation, it is useful to recall the statement of the Court at the hearing in this case on December 11, 1961, regarding the possibility of administrative practice evolving into law. (Tr. December 11, 1961, p. 3.)

#### IV

#### REPLY TO TAXPAYER'S ARGUMENT II

##### *Government's Exhibit 1:*

Although the taxpayer claims that mere careful analysis of the rulings involved in this case is needed, the analysis which he offers of the ruling letter dated February 14, 1944 is seriously in error. Far from being a more careful analysis, the taxpayer's discussion of this ruling is based on a surprising misreading of this letter.

The Ruling Letter which has become Government Exhibit 1 was issued on February 14, 1944 in response to an inquiry from an Internal Revenue Agent. The agent questioned the correctness of a 1941 ruling which had permitted an insurance company to file fiscal year consolidated income tax returns with its parent. The Internal Revenue Service reconsidered its earlier ruling, and decided that it was incorrect. The result of this decision is diagrammed in Chart I, Appendix, *infra*.

The thoroughness with which the Internal Revenue Service considered the question posed by the Internal Revenue Agent's inquiry is indicated by existence of the General Counsel's Memorandum, Number 24109, dated February 1, 1944, which has been introduced as Plaintiff's Exhibit C, and which expressed the concurrence of the Chief Counsel of the Internal Revenue Service in the issuance of the proposed ruling. It is important to compare what this February 1944 ruling letter *actually said* with what the taxpayer in its brief *says it said*. *The taxpayer states that* (Br. 35):

\* \* \* the Deputy Commissioner issued a ruling letter to the insurance company subsidiary revoking permission to adopt a fiscal year accounting period and stating that, *thereafter, no consolidated return would be accepted unless filed on a calendar year basis*; \* \* \* (Emphasis added.)



*As a matter of fact*, the ruling letter actually granted permission to file *yet another* consolidated fiscal year return for the period ending November 30, 1944, including the income of the insurance company involved for the full twelve-month period from December 1, 1943 to November 30, 1944. The explicit words of the ruling are as follows (Deft. Ex. 1, p. 1):

• • • Consolidated returns will be accepted for the fiscal years ended November 30, 1941, 1942, and 1943, and the fiscal year ending November 30, 1944. (Emphasis added.)

The fact that the taxpayer has erroneously described the February 1944 ruling letter is important because the taxpayer later asserts (Br. 57-66) that the fiscal year filing permission granted in the ruling letters dated August 21, 1951, and May 22, 1953 (Deft. Exs. 5, 6), was completely unprecedented. As the taxpayer surely realizes, the precedent for the granting of such permission lies in the 1944 ruling letter, now under discussion (and in the 1947 letter, which will be discussed below). *The whole point of the 1944 ruling is that the Service would not allow a permanent change of an insurance company's accounting period to a fiscal year, but would allow a fiscal year period as an interim measure in the process of conforming the accounting periods of an insurance subsidiary and its parent corporation. This matter will be discussed again in connection with the 1951 and 1953 rulings.*

The taxpayer's misreading of the 1944 letter is also significant in connection with their argument that Allstate-Sears could not have filed a consolidated return for 1950 after the passage of the Korean Excess Profits Tax Act on January 3, 1951. *The 1944 ruling letter shows that Allstate could have filed a consolidated return based on Sears' fiscal year ending January 31, 1951, had it chosen to do so. To do this, Allstate would have filed a short period return for the month of January 1950, and Sears-*

*Allstate would have shifted to a calendar year basis by the submission of a short period return for the final eleven months of 1951, just as the companies involved in the 1944 ruling shifted to a calendar year basis by submitting a short period return for the month of December 1944. See Charts I and VIII, Appendix, infra.*

The taxpayer summarizes its views on Government Exhibit 1 with a noteworthy compendium of erroneous statements. (Pltf. Br. 38.) The taxpayer first *states* that this exhibit "indicates that the Commissioner would not have allowed Allstate to adopt Sears' January 31 fiscal year for the purpose of filing a consolidated return". *In fact*, the exhibit indicates quite the contrary. *The ruling indicates that the Commissioner in January 1951 would have allowed Allstate to file a consolidated return based on its parent's fiscal year ending January 31, 1951, just as the Commissioner in February 1944 allowed the taxpayer to file a consolidated return based on the parent's fiscal year ending November 1944.*

The taxpayer next *states* (p. 38) that the 1944 ruling would have required submission of a request for change of accounting period by Sears at least 60 days before December 31, 1950. *In fact*, the 1944 letter does not discuss requests for changes of accounting period, but it does indicate that permission to change to a calendar year effective December 31, 1944, should be obtained.\* (See the last

\* It is reasonably clear that the 60-day notice requirement applies to the change to the calendar year period *after* submission of the consolidated fiscal year return for the period ending November 30, 1944. When we apply this reasoning to the case at bar, we see that the 60-day notice requirement *applies to 1951, not 1950*, as alleged by the taxpayer. After submission of a consolidated fiscal year return by Allstate-Sears for the fiscal year ending January 31, 1951, Allstate-Sears would have to change to the calendar year effective December 31, 1951, and hence would have to file a request for change by November 1, 1951, *not* November 1, 1950.



paragraph of the ruling letter.) The taxpayer also concludes (Br. 38) that the 1944 ruling gives no assurance that the Commissioner will grant permission to change accounting periods. However, any fair reading of the 1944 letter clearly indicates that the Commissioner expects to approve a request for a change of accounting period, should the taxpayer choose to submit one.

The taxpayer next *states* (Br. 38) that it was too late for Sears to apply for permission to change accounting periods as of the date of passage of the Korean War Excess Profits Tax Act. This is a repetition of one of the taxpayer's erroneous lack-of-knowledge arguments, discussed earlier in this brief. This argument cannot change *the fact that at any time prior to November 1, 1950, Sears could have applied for a change in accounting period which would have allowed it to conform with the accounting year of its subsidiary, Allstate, by filing a consolidated return on December 31, 1950. See alternative method Chart VIII, Appendix, infra.* Nor can this argument change *the fact that, subsequent to the passage of the Korean War Excess Profits Tax Act on January 3, 1951, Allstate could have filed a consolidated return to conform with the fiscal year of its parent Sears, ending January 31, 1951, provided that it then filed an amended return for January 1950 and (after Sears had requested and received permission to change to a calendar year effective December 31, 1951) a short period consolidated return with Sears for the remaining 11 months of 1951.*<sup>5</sup> See Chart VIII, Appendix, *infra*.

<sup>5</sup> Note that the Government believes that the practice is equally relevant to show the availability of either method to the taxpayer. The essential fact is that rather than being "hard-nosed" the Commissioner had "found a way out, the aim being to allow these corporations to file consolidated returns \* \* \*." (Dep. 178.)

Finally, in its brief (p. 39), taxpayer repeats its assertion that the only question involved in this case is whether Allstate-Sears could have filed a consolidated return for Allstate's calendar year ending December 31, 1950. As pointed out earlier the real question is, whether Allstate-Sears could have begun to file a consolidated return in 1950 *or in any other year subsequent to 1944* and, alternatively, whether these companies could have filed a consolidated return on the basis of *Sears' fiscal year ending January 31, 1951*. The ruling letter dated February 14, 1944, clearly indicates that the answer to both these questions must be "yes".

#### *Government Exhibit 2:*

Government Exhibit 2 is a ruling letter dated May 26, 1945, which was issued in response to a request from a taxpayer dated April 17, 1945 (which has now become Government Exhibit 2A). The April letter requested information as to whether a consolidated return could be filed for the period subsequent to the acquisition by the taxpayer of an insurance company subsidiary. The procedure permitted by this ruling letter is diagramed in Chart II, Appendix, *infra*.

The taxpayer attempts to show that the ruling letter contained in Defendant's Exhibit 2A contained only information already outlined in Sections 23.13 and 23.32 of Treasury Regulations 104 (1939 Code) entitled Consolidated Returns of Affiliated Railroad Corporations and Pan American Trade Corporations. Those Regulations indicate what is to be done when a parent corporation wishes to file a consolidated return with a subsidiary acquired at some time after the start of a taxable year. However, those Regulations do not cover, with any explicitness, when and how a corporate parent may file a consolidated return with

an insurance company subsidiary. This is indicated by the fact that the taxpayer who sent the letter which is Government Exhibit 2A found it necessary to request a ruling even though his letter of request indicates a very detailed knowledge of the consolidated return Regulations. The taxpayer points out that this ruling was not recommended for publication because, among other things, it was "Sufficiently covered by the regulations". (Dep. 91.) The Government suggests that, despite the taxpayer's desperate attacks, this ruling letter is most significant because it shows that the Bureau had adopted a policy of permitting parent corporations which own insurance company subsidiaries to file consolidated returns, provided that the parent took steps to conform its accounting period to the subsidiary's calendar year accounting period. The taxpayer's claim that the Government's Exhibit 2 does not represent a significant policy statement is especially strange in view of the fact that the Revenue Service chose this ruling for distribution to the field as Confidential Unpublished Ruling 1661. Far from failing to add anything new to existing policy, this ruling was considered sufficiently indicative of Service policy to justify distribution to the field offices of the Internal Revenue Service as a reference guide for revenue agents. (Dep. 57-59.)

*Government Exhibit 3:*

Government Exhibit 3 is a ruling letter dated September 12, 1945. Like Government Exhibit 2, it was written by Mr. Earl C. Heft. In this instance, a parent corporation had acquired an insurance company subsidiary shortly prior to requesting a ruling. The company wished to file a consolidated fiscal year return with its insurance subsidiary *as a permanent matter*. Since the request was for a permanent change, the Commissioner denied the corporation's request. This was, of course, fully in line with the

1944 ruling. This ruling is diagrammed in Chart III, Appendix, *infra*.

The taxpayer *claims* that this ruling letter held that "under no circumstances will an insurance subsidiary be allowed to adopt a fiscal year accounting period for the purpose of filing a consolidated return with its parent". (Br. 46.) But where does the taxpayer find such a conclusion in this ruling letter? The words "under no circumstances" do not occur at any point in the letter. Moreover, it would be strange indeed if those words did occur because they would be inconsistent with the Service's position in its 1944 ruling letter (Government Exhibit 1) which permitted filing of a consolidated fiscal year return *in the year in which the affiliated group changed its accounting period*. What Government Exhibit 3 *in fact* holds is that an insurance company may not change to a fiscal year accounting period *as a permanent matter*. This holding is, of course, perfectly consistent with the granting of permission to file a consolidated fiscal year return *in the change-over year*, as was done in the 1944, 1947, 1951, 1953, and 1956 rulings, and as is currently allowed by Regulations, Section 1.1502-14(c).

The taxpayer's interpolation of words into Exhibit 3 which do not in fact appear in that ruling letter may be a result of its misreading of the ruling letter dated February 14, 1944, which, as will be remembered, permitted the filing of a consolidated fiscal year return for the years 1941, 1942, 1943 *and the fiscal year ending November 30, 1944* (1944 being the changeover year). Or it may be a result of the taxpayer's warm desire to prove that Allstate-Sears could not have filed a consolidated return for Sears fiscal year ending January 31, 1951. But neither of these factors can justify taxpayer's attempt to misstate what Government Exhibit 3 actually says.



The taxpayer also seeks to attack Government Exhibit 3 because it was not found in the general or Precedent Files of the Internal Revenue Service. However, there can be no question as to whether this ruling was in fact issued. First, Assistant Commissioner Swartz has so testified (Dep. 24); second, the taxpayer has so stipulated (Stip. filed November 6, 1961, Par. 1). Mr. Swartz assumed (Dep. 105) that this ruling might be from the files of a specialist in the Corporation Branch, but he also testified (Dep. 34-35, 44) that, although specialists files were scrutinized to get the names of rulings, those rulings were then further searched in the general and Precedent Files. In any event, there has been no showing that production of a document from a Revenue Service specialist's file is improper, provided the file was maintained in the normal course of the specialist's work as was the case here. (Dep. 105.)

*Government Exhibit 4:*

Government Exhibit 4 is a ruling letter, dated February 5, 1947, which was issued in response to a taxpayer request dated October 15, 1945. (Deft. Ex. 4 C.) The taxpayer in this instance reported income on the basis of a fiscal year ending September 30th. On July 1, 1946, it had acquired an insurance company on a calendar year basis with which it wished to file a consolidated return for all periods subsequent to the acquisition, *including the final quarter of the parent's fiscal year ending September 30, 1946. The ruling letter granted the taxpayer's request to file a consolidated fiscal year return, including the income of the insurance company subsidiary in the income of the parent for July-September, 1946. Subsequently, the insurance company and the parent were to file a consolidated short period return covering October-December, 1946, thereby placing them both on a calendar year basis. See Chart IV, Appendix, infra.*

The taxpayer in the present action claims (Br. 51) that this was "another instance in which the Commissioner changed his mind, in grappling with the consolidated return problem". The taxpayer bases his argument on the fact that an earlier letter dated October 10, 1946 (Government Exhibit 4 B) had been sent to the same taxpayer denying him the right to file a consolidated return with its insurance company subsidiary for the months of July, August, and September 1946. However, an examination of the circumstances surrounding the issuance of the letter of October 10, 1946, shows that it is unrealistic to view that letter as representative of a change in Service policy. The October 10th letter was written four days<sup>6</sup> after receipt of a taxpayer inquiry which had requested a reply "at the very earliest opportunity". (Government Exhibit 4 A.) Compliance with the taxpayer's request for a speedy reply may have made it impossible to review the October 10th letter as thoroughly as might otherwise have been the case, and may provide an explanation as to why Government Exhibit 4 B was issued. It is noteworthy that the October 10, 1946 letter was the only letter on this subject issued by the Internal Revenue Service in the decade from 1945 to 1955 which was not either written or reviewed by Mr. Earl C. Heft. However, Mr. Heft came into the picture when the taxpayer, dissatisfied with the answer which he received when he attempted to stampede the Service into

<sup>6</sup> Government Exhibit 4 A was stamped "received" on October 4, 1946; the block in the lower left hand corner of page 2 of Government Exhibit 4 B indicates that this letter was typed in final form on October 8, 1946. Hence, this letter could only have been the roughest sort of curbstone opinion designed to satisfy a taxpayer who wanted a quick answer.



issuing a ruling, requested a reconsideration of the Service's position. (Government Exhibit 4 C.) The ruling letter which was issued four months later was written by Mr. Heft and was entirely consistent with Service practice at all times from 1944 onward. Far from being an example of a case in which the Commissioner changed his mind, the letter of October 10, 1946, is an example of an instance in which the taxpayer gave the Commissioner too little time to make up his mind.

The taxpayer also seeks to show that the February 1947 ruling has no pertinence to the Allstate-Sears situation. (Br. 51.) But it is certainly whimsical to try to argue in this fashion, because, if the 1947 ruling indicates nothing else, it shows clearly that *the Commissioner was willing to permit a fiscal year return of a parent company to include the income of an insurance company subsidiary as a step to conforming the accounting periods of the two firms.*<sup>7</sup> In the Allstate-Sears situation, this can reasonably be interpreted to mean that the Commissioner would have permitted a consolidated return for the fiscal year ending January 31, 1951, provided that further steps were taken

<sup>7</sup>As the Income Tax Unit states in its memorandum to Chief Counsel on this ruling (Pltf. Ex. B):

It appears that under a strict interpretation of the regulations a denial of the right to file a consolidated return for the above-mentioned year would be justified but in view of the circumstances in the case and the apparent desire of the companies involved to fulfil the requirements of the regulations with respect to filing consolidated returns, it is believed that the granting of such right would not jeopardize the Government's interest and that from an administrative standpoint the proposed ruling is sound.

to conform the accounting periods of the two companies as diagramed in Chart VIII, Appendix, *infra*.

Because the taxpayer fails to understand the point just outlined, he claims later in his brief (pp. 59-60) that he is astounded by the issuance in 1951 of the ruling letter which has become Government Exhibit 5. He goes so far as to claim that Exhibit 5 is in error because it permits an insurance company subsidiary to file a fiscal year return with its parent as a means of conforming the accounting years of the two companies. He also claims that the 1951 ruling could not have been predicted. Had taxpayer not misread Government Exhibit 1, and had it not been so intent on insisting that the 1947 ruling had no pertinence to a decision of the issues of this case, the taxpayer might have noted that the 1951 ruling grows naturally out of the provisions contained in the 1947 ruling letter, together with the 1944 ruling.

#### *Government Exhibit 5:*

Government Exhibit 5 is a ruling letter dated August 21, 1951. It was issued in response to a series of requests from a parent corporation which owned an insurance subsidiary and which wished to file consolidated returns with that subsidiary. The first of this series of requests was dated June 29, 1951 (see Government Exhibit 5 B). In it, the taxpayer requested permission to file a consolidated return for the fiscal year ending August 31, 1951. The taxpayer states that the proposal would include in the consolidated return the income of the insurance subsidiary only for the period from January 1, 1951 to August 31, 1951. (Br. 57.) However, a thorough reading of page 3 of the enclosure to Government Exhibit 5 B indicates that the writer of the letter also had in mind the possible inclusion of insurance

company income in the parent's tax return for the *full fiscal year* ending August 31, 1951.\*

On July 25, 1951, the taxpayer submitted a second request, asking that it be granted permission to file consolidated fiscal year returns not only for the *full fiscal year* beginning September 1, 1950 and ending August 31, 1951, but also for the *full fiscal year* from September 1, 1949 to August 31, 1950. (Government Exhibit 5 A.)

The ruling letter issued in response to these two requests *granted permission to the entire corporate group to file consolidated returns for the full fiscal year ending August 31, 1950, and August 31, 1951.* See Chart V, Appendix *infra*. The ruling letter of August 21, 1951 makes clear that this especially generous treatment is permitted because of the unusual circumstances surrounding the delayed enactment of the Korean Excess Profits Tax Act of 1950 on

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\* The Government submits that this is just one more example of the taxpayer's attempt to misread the rulings in its favor. This consistent misreading is particularly ironic in view of the taxpayer's statement that (Br. 33-34):

\* \* \* we do promise that careful analysis will cut through the smoke screen with which the Government has surrounded these rulings \* \* \*.

The Government submits that the "smoke screen" is the taxpayer's own creation. The Government originally wished to let the ruling letters speak for themselves. The taxpayer interpreted this as an invitation to twist and distort the plain meaning of the rulings' statements. The fact that a smoke screen *now* exists makes it all the more important for the Court to read each of these ruling letters for itself, asking, in particular, whether they show the existence of a practice under which, from 1944 forward, an insurance subsidiary could conform its accounting year with that of its parent by *filing a consolidated fiscal year return followed by a consolidated short period return to place the affiliated group on a calendar year basis.*

January 3, 1951. (Government Exhibit 5, p. 3.) In this respect, the lenient treatment given the taxpayer resembles that accorded to the taxpayer who received the 1944 ruling letter now contained in Government Exhibit 1. It will be recalled that, in that instance, the taxpayer had been filing returns in accordance with a 1941 ruling letter which the Commissioner wished to revoke.

On its facts, the ruling of August 31, 1951 is indistinguishable from the situation confronting Allstate-Sears in the years 1950 and 1951. In each instance, a question is involved as to whether a corporate insurance subsidiary can file a consolidated return with its parent. Each instance involves the enactment of the Korean War Excess Profits Tax Act of 1950 on January 3, 1951. Finally, in each instance, the insurance subsidiary had been owned by the parent company for a number of years prior to the request for permission to file consolidated returns. *Hence, the 1951 ruling letter is particularly indicative of what would have happened had Allstate-Sears chosen to file a consolidated return for Sears' fiscal year ending January 31, 1951.*

Because the taxpayer is unable to distinguish the 1951 ruling on its facts, he has been forced to argue that this ruling was erroneous and unprecedented. (Br. 60.) This argument is not convincing. First, an examination of the initials which appear on Defendant's Exhibits 2, 3, 4 and 5 indicates that all these ruling letters were drafted by the same person, namely, Mr. Earl C. Heft. It would be very strange indeed if, after having issued rulings in this area since 1945, Mr. Heft suddenly issued a ruling which was both erroneous and unprecedented. Second, the taxpayer's own cross examination of Assistant Commissioner Swartz pointed out that the writer and reviewers of this



ruling were aware of the existence of Government Exhibits 2 and 4 since references to these rulings were noted on the original signature page of Exhibit 5. (Dep. 128-130.)

The taxpayer's assertion that permission to file consolidated returns for the complete fiscal years ending August 31, 1950 and August 31, 1951 was unprecedented and unpredictable is a direct result of its misreading of Government Exhibits 1 and 4, as has been pointed out above. It will be recalled that in the February 1944 ruling letter (Government Ex. 1) the Commissioner granted permission to file a consolidated return with an insurance company subsidiary for the complete fiscal year ending November 30, 1944. In the 1947 letter permission to file a consolidated fiscal year return for July-September 1947 was granted. Here, the Commissioner similarly granted permission to file consolidated fiscal year returns, even though an insurance subsidiary's income was included in those returns.

The taxpayer seeks to make much of the fact that this ruling was not placed in the Precedent File. This only becomes a matter for surprise if, based upon a misreading of earlier rulings, the present ruling letter is regarded as a departure from prior precedents. However, there are several plausible reasons why this ruling letter was not placed in the Precedent File. First, Confidential Unpublished Ruling 1661 had already been distributed to the field when the 1951 ruling letter was written. Since this ruling letter was not in conflict with Confidential Unpublished Ruling 1661 and since the permission to file a consolidated return for a full fiscal year was in accord with the basic 1944 ruling, already in the Precedent File, there was no need to place the 1951 letter in the Precedent File. Second, the writer of this ruling, Mr. Earl C. Heft, apparently regard-

ed this ruling as routine. (Dep. 133-134.) Since the views of the writers of rulings as to whether they shall be classified as precedents are given great weight (Dep. 22, 70), his decision on this matter prevailed.

In reality, the taxpayer is seeking to stigmatize as unpredictable each step by which a body of law has developed on the subject of the submission of consolidated returns where insurance company subsidiaries are involved. This taxpayer's accusation is as old as the common law itself but, fortunately, it has seldom been permitted to stifle the natural growth of a coherent body of legal doctrine.

The taxpayer also seeks to attack the 1951 ruling as in conflict with Sec. 29.46-1 of Treasury Regulations 111 (1939 Code) which requires submission of an application for change of accounting period when a parent conforms with the accounting year of its subsidiary. (Br. 60.) We fail to understand taxpayer's argument. This requirement of the Regulations applies *only when a parent changes to fit the accounting period of the subsidiary*. Treasury Regulations 129 (1939 Code), Sec. 24.14. Thus, this requirement would apply, under the facts of Exhibit 5, when the affiliated group changed to the calendar year *as of December 31, 1951*, not when the subsidiary changed to the fiscal year of the parent in 1950. See our discussion of this subject in footnote 4, *supra*.

The taxpayer also seeks to use Rev. Rul. 55-80, 1955-1 Cum. Bull. 387, as a means of arguing that the 1951 ruling letter was in error. Rev. Rul. 55-80 has already been discussed by the Government at pages 21-22 of its Brief in Opposition to Plaintiff's Motion to Strike. At that time, it was pointed out that Rev. Rul. 55-80 does not have any bearing on the question whether the Commissioner was correct in allowing insurance subsidiaries to file a consolidated fiscal year return with their parents as a first



step to conforming their accounting periods. The correctness of the Government's view on this matter is shown by the fact the Rev. Rul. 55-80 has not been modified or changed since the promulgation of Regulations Section 1.1502-14(C) by T.D. 6412, 1959-2 Cum. Bull. 199, as would certainly have been the case if the taxpayers were correct about the existence of a conflict between Rev. Rul. 55-80 and the practice now under consideration, because, as was pointed out in footnote 3, *supra*, Regulations Section 1.1502-14(C) codifies the practice shown in Government Exhibits 1 through 7.

The taxpayer also states (Br. 59) that there is no basis for the statement contained on page 2 of Defendant's Exhibit 5 that "it has been the policy of the Bureau in cases of this kind to permit the filing of the first consolidated return of an affiliated group upon the basis of the fiscal year of the common parent corporation". The taxpayer's argument on this point (Br. 58-59) fails to note the fact that Mr. Earl C. Heft, the individual who asserted that such a policy existed, had been writing the rulings in this area since 1945. In addition, the taxpayer's statement neglects the fact that Confidential Unpublished Ruling 1661 had been circulated to Internal Revenue Service field offices in 1947, thereby establishing a firm precedent within the Internal Revenue Service in dealing with cases of this kind.

The taxpayer also argues that the Commissioner was too lenient in this ruling. It may be, as Commissioner Swartz indicated in his deposition, that the Commissioner could have been "hard-nosed" and refused to permit the filing of consolidated returns under the circumstances here involved. (Dep. 178.) However, in view of the fact that the Commissioner of Internal Revenue had discretion which he could legitimately exercise in this area, it hardly lies

in the mouth of the taxpayer to complain that in the administration of the Internal Revenue laws the Commissioner was more lenient than he might have been, had he enforced the law in its full rigor. The correctness of the Commissioner's decision in favor of leniency is indicated by the fact that these very procedures have now been incorporated into the Regulations of the Internal Revenue Service. The taxpayer has not seen fit to challenge the correctness of the present Regulations even though they embody the same lenient policies which he now condemns as erroneous.

Finally, the taxpayer complains that his investigation of the origins of Defendant's Exhibit 5 has been hampered by the "cloak of executive privilege". (Br. 64.) However, taxpayer has not shown how any investigation which it has indicated a desire to make has been hampered by such a claim. Nor did anything in Taxpayer's Motion to Produce, filed on January 4, 1962, relate to Exhibit 5. In the absence of any showing by the taxpayer that his research has been hampered by a claim of executive privilege, it must be concluded that this plaint is baseless and hollow. The taxpayer also contends that Government Exhibit 5 is self-serving. (Br. 65.) Again, he completely fails to show how this allegation can possibly be true. Government Exhibit 5 was issued *ante litem motam*, and it is therefore fantastic to allege that this ruling letter was in some way issued as a means of preparing for the present litigation.

#### *Government Exhibit 6:*

Government Exhibit 6 is a letter dated May 22, 1953 which was issued in response to a request dated May 4, 1953 from a corporation which wished to file a consolidated return with its already acquired insurance company subsidiary. The ruling permitted the entire affiliated group, including the insurance company, to file a consoli-

dated fiscal year return for the entire fiscal year ended May 31, 1953. The subsidiary then filed an amended separate return for the period from January 1, 1952 to May 31, 1952 and the affiliated group filed a consolidated short period return for the period June 1, 1953 through December 31, 1953. See Chart VI, Appendix, *infra*.

The taxpayer claims that this letter ruling perpetuates the alleged error involved in the ruling letter of August 21, 1951 in that it permitted a parent with an insurance subsidiary to file a consolidated fiscal year return. The Government agrees that his ruling carries forward and perpetuates the policy and practice of the 1951 ruling. The taxpayer's difficulty is that it fails to understand the 1951 ruling—because it has failed to read the 1944 and 1947 rulings.

If this ruling were applied to the situation facing Allstate-Sears in the month of January 1951, *it is clear that permission would have been granted to those two companies to file a consolidated return for Sears' fiscal year ending January 31, 1951*, just as the two companies involved in Government Exhibit 6 were permitted to file a consolidated return for the parent's fiscal year ending May 31, 1953. Allstate would then have filed a separate amended return for the month of January 1950 just as the insurance company involved in Exhibit 6 filed a separate return for the period from January 1, 1952 through May 31, 1952; finally, Allstate-Sears would file a short period consolidated return for the last eleven months of 1951 just as the companies here involved filed a consolidated short period return for the last seven months of 1953. See Charts VI and VIII, Appendix, *infra*.

Hence, this ruling letter, far from perpetuating an error, simply applies the techniques for filing consolidated re-

turns which were first developed in 1944 and which were so well exemplified in the 1947 and 1951 ruling letters. (Government Exs. 4 and 5.)<sup>9</sup> By use of these techniques, Allstate-Sears could have filed a consolidated return for Sears' fiscal year ending January 31, 1951, even if it took no action to file such a return until after the passage of the Korean Excess Profits Tax Act.

*Government Exhibit 7:*

Government Exhibit 7 is a letter dated January 18, 1956 to a parent company which had acquired an insurance subsidiary on January 1, 1955. The Commissioner ruled that the parent and the insurance company could file a consolidated return for the parent's fiscal year ending September 30, 1955 including the income from the subsidiary from January 1, 1955 forward. The affiliated group was then to file a consolidated short period return covering the last quarter of 1955 so as to place the entire affiliated corporate group on a calendar year basis. See Chart VII, Appendix, *infra*.

The taxpayer makes much of the fact that the Chief Counsel of the Internal Revenue Service expressed the view that this ruling should not be published because "the proper solution to the problem presented requires an amendment to the consolidated return regulations". (Pltf. Ex. A, final paragraph.) However, in making this argument, the taxpayer seriously misquotes the Chief Counsel. It is the taxpayer's claim, made first at page 68 and again at page 72 of its brief, that it was the Chief Counsel's view that "the *only* proper solution was a formal regulation". (Emphasis added.) However, reference to the phrase from taxpayer's own Exhibit A, quoted above, indicates that

<sup>9</sup> These same techniques are, of course, now embodied in Regulations Section 1.1502-14(C). For a discussion of this matter see footnote 3, *supra*.



this is not what the Chief Counsel said. The taxpayer has cleverly distorted the Commissioner's statement by the addition of the single word "only"; the result of this distortion is to imply that the Chief Counsel felt the service's prior administrative solution to the consolidated return problem to be improper. This is certainly not the case, as the final paragraph of taxpayer's Exhibit A clearly indicates.

The taxpayer fails to note that the publication suggestion made by the Chief Counsel is yet another step in the natural process which began with the dispatch of the ruling letter dated February 14, 1944. Just as the Clifford Regulations evolved out of the prior case law and practice, and were subsequently enacted into statute law,<sup>10</sup> so, here, we see the slow but ordered development of a coherent body of doctrine regarding the filing of consolidated returns where insurance company subsidiaries are involved. It is entirely natural and correct that embodiment in Regulations should have been considered appropriate at some point in the development of this body of law. The Chief Counsel's memorandum shows that this point had been reached as of 1957 in connection with the administrative rules governing the submission of consolidated returns involving insurance company subsidiaries. Hence, far from showing that prior rulings were incorrect or improper, the Chief Counsel's recommendation shows that the law in this area was developing in a natural and orderly fashion.

<sup>10</sup> The administration of the doctrine announced in 1940 by the Supreme Court in *Helvering v. Clifford*, 309 U.S. 331, caused so much difficulty that the Treasury eventually promulgated Sections 39.22(a)-21 and 39.22(a)-22 of Regulations 118. The 1954 Code enacted these Regulations into law. Secs. 671-675 and 678, Internal Revenue Code of 1954.

## V

## REPLY TO TAXPAYER'S ARGUMENT III

In this section of its brief the taxpayer admittedly repeats "matter [which] has been completely covered in the November 6, 14, and 17 briefs filed by the parties in connection with plaintiff's motion to strike Swartz' affidavit". (Pltf. Br. 71.) Because the taxpayer is repeating itself, the Government will give only a short reply.

The taxpayer again alleges (Br. 71-72) that the Federal Register Act and the Administrative Procedure Act state a policy against allowing unpublished administrative procedure "to be used against the public". Even if this statement were true, it misses the point—unpublished administrative procedure is not being "used against" Allstate-Sears in the present case. That corporate group is not being forced to file consolidated returns for the years involved; nor is any reliance interest of theirs in jeopardy. The Government offers proof of administrative practice in the Revenue Service only to show that if *Allstate-Sears* had wished to file a consolidated return at any time after February 1944, it could have done so by following the same route that was used by the companies whose affairs are outlined in Government Exhibit 1 through 7 and Charts I through VII. This being so, Allstate-Sears fails to qualify for the growth credit, irrespective of whether Allstate-Sears ever made application to file a consolidated return or wished to file such a return. To put the matter a different way, because Section 435(e)(1)(A)(i) of the Korean War Excess Profits Tax Act is couched in hypothetical terms, reliance is not an issue in this case.

The taxpayer concludes by attempting to generate fears as to what may happen if the Court finds for the Government on the issue of the existence of administrative practice. The taxpayer states that the effectiveness of the



Service's ruling procedure would be destroyed, but the taxpayer fails to show how this might occur. Whatever unnamed fears may affect the taxpayer apparently do not disturb the Commissioner of Internal Revenue with whose permission the testimony in the present case was taken.

## VI

### REPLY TO PARAGRAPH ONE OF TAXPAYER'S CONCLUSION

On page 16 of its brief, the taxpayer raises a question as to whether Assistant Commissioner Swartz was properly qualified as an expert on consolidated returns. On page 73, in paragraph one of the taxpayer's "conclusion" it is stated as a fact that the Assistant Commissioner was not qualified as an expert in the subject of consolidated returns. Between these two points in the brief there is no argument on this subject. To draw a conclusion from a question is surely a strange procedure.

The Government feels that the material contained at pages 10-15 of Assistant Commissioner Swartz' deposition amply qualifies him to testify as to the contents of Government Exhibits 1-7; this testimony shows that Assistant Commissioner Swartz is probably the most skillful person in the Nation in interpreting and describing Service practice in issuing rulings such as those involved here. The Commissioner is not a specialist in consolidated returns (Dep. 107), but he would not be Assistant Commissioner if he were. It is his broad experience with the Revenue Service over the past 26 years and his intimate day-to-day experience with the ruling process over the past decade which qualifies him to speak on the facts involved in this phase of the case. (Dep. 10-15.)

As to Assistant Commissioner Swartz' qualifications, the Government rests on his deposition testimony.

### PROPOSED FINDINGS OF FACT

In light of the Government's proof of administrative practice in the Internal Revenue Service from 1944 until 1956, the Court is respectfully requested to make the following findings of fact:

1(a) Government Exhibits 1, 4, 5, 6, and 7, dated 1944, 1947, 1951, 1953, and 1956 respectively, and current Treasury Regulations 1.1502-14(c) all permit a consolidated return of an affiliated corporate group containing an insurance company to be filed on the basis of the fiscal year accounting period of the common parent, provided that this is done as an interim step in the process of shifting the entire affiliated group to a calendar year accounting basis.

1(b) Had the plaintiff, Allstate Insurance Company, and its corporate parent, Sears Roebuck and Company, requested permission to file a consolidated tax return subsequent to the passage of the Korean War Excess Profits Tax Act on January 3, 1951, permission to file a consolidated return based on Sears' fiscal year ending January 31, 1951 would have been granted, provided that this was done as an interim step in the process of shifting the entire affiliated group to a calendar year accounting basis.

2(a) Government Exhibit 2, dated 1945, permits an insurance company, formerly on a calendar year basis, and a parent corporation, formerly on a fiscal year basis, to file a consolidated short period return for the purpose of shifting the entire affiliated group to a calendar year basis.

2(b) If the plaintiff, Allstate Insurance Company, and its corporate parent, Sears Roebuck and Company, had timely requested permission to file a consolidated return at any time subsequent to the issuance of Government Ex-

hibit 2 in 1945, the Commissioner would have granted them permission to do so. The two companies could then have filed a consolidated short period return for the period from February 1 through December 31, and consolidated calendar year returns thereafter.

2(c) If, at any time in the year 1950 prior to November 1, the plaintiff, Allstate Insurance Company, and its corporate parent, Sears Roebuck and Company, had requested permission to file a consolidated return for the calendar year 1950, the Commissioner would have granted them permission to do so, using the method outlined in finding 2(b), above.

Respectfully submitted,

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MARCH, 1962

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 841-72

TAX ANALYSTS AND ADVOCATES, et al.,  
Plaintiffs,

v.

INTERNAL REVENUE DEPARTMENT, et al.,  
Defendants.

Washington, D. C.

Tuesday, December 5, 1972

Deposition of JOHN F. SIMMONS taken on behalf of the plaintiffs in the above-entitled action, at the Internal Revenue Service Building, Room 3419, Tenth Street and Pennsylvania Avenue, N. W., Washington, D. C., pursuant to notice, beginning at 10:07 o'clock, a.m., before Emma N. Lynn, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

For the Plaintiffs:

WILLIAM A. DOBROVIR, ESQ.,  
2005 L Street, N. W.,  
Washington, D. C.  
THOMAS F. FIELD, ESQ.,  
732 17th Street, N. W.,  
Washington, D. C.

For the Defendants:

LOUIS J. LOMBARDO, ESQ., and  
CHARLES E. STRATTON, ESQ.,  
Tax Division,  
Department of Justice,  
Ninth and Pennsylvania Avenue, N. W.,  
Washington, D. C.

— — —

## P R O C E E D I N G S

Whereupon,

JOHN F. SIMMONS was called for examination by counsel for the plaintiffs, and having been first duly sworn by the notary public, was examined and testified as follows:

*Examination by Counsel for the Plaintiffs.*

By Mr. Dobrovir:

Q. Please state your full name.

A. John F. Simmons.

Q. And your present position in the Internal Revenue Service?

A. Chief of the Manual and Field Conference Section, Technical Services Branch, Technical Publications and Services Division, Internal Revenue Service.

Q. How long have you had that post?

A. Since 1965.

Q. Is it July 1965?

A. Yes, July '65.

Q. Would you trace your career in the Internal Revenue Service for us, giving posts and a brief description of the duties in those posts?

A. I came with the Internal Revenue Service in 1945, November, went to the Audit Review Division where I post reviewed revenue agents' reports.

About 1950, I went with the Executive Management Office of the Income Tax Division, doing administrative work as compared to technical work.

In 1952, in the reorganization of the Internal Revenue Service, I went with the Technical organization which was created at that time, and I have been with the Technical organization ever since then in various places in the organization, in that organization.

Q. And in the Technical organization since 1952, could you briefly describe your duties or functions?

A. I was with the Technical Planning Division for a short time.

I worked in the immediate Office of the Assistant Commissioner of Technical—let's see how long it was—for three or four years, I guess, on administrative work. And then I went with the Technical Projects Branch which prepares the booklets, *Your Federal Income Tax* and others. I did that type of work.

I guess I was with them until 1965 when the realignment of the Technical organization took place, when I took over my present position.

Q. What are your functions in your present position?

A. Well, I am the coordinator for all the procedures that go into Part XI of the Internal Revenue Manual.

Q. What are they?

A. Well, that is all the way from drafting procedures to work with or divisions in getting procedures ready where they are needed and coordinating with other organizations outside of Technical.

Q. When you say Part XI of the IRS Manual, what does that mean in terms of the organization of the manual?

Maybe you could tell us how the manual is organized.

A. There are 12 parts to the Internal Revenue Manual. Technical has one part, and that is Part XI.

Part XI is divided into 11 chapters.

Do you want all the chapters?

Q. It might be helpful.

A. Chapter 000, Introduction to Part XI, IRM.

Chapter 100, Authorities and Standards.

Chapter 200, General Administration.

Chapter 300, Regulations and Legislation.

Chapter 400, Tax Forms Development.



Chapter 500, Technical Study Projects.

Chapter 600, Rulings, Determination Letters, Opinion Letters, Information Letters and Closing Agreements Covering Specific Matters.

Chapter 700, Technical Advice, Assistance and Information.

Chapter 800, Assistance to Other Offices.

Chapter 900, Revenue Rulings and Revenue Procedures.

Chapter (10)00, Technical Publications Program.

Chapter (11)00, Other Technical Programs and Services.

Q. And you are in charge of all of this Chapter XI, all 11 chapters?

A. Part XI.

Q. Part XI with all 11 subjects?

A. Yes. Eleven chapters.

Q. Now, is this Chapter 600, which deals with rulings and so forth—does that have instructions to agents on how—

A. Well, the procedures in Part XI concern primarily the Technical organization.

We don't have any field offices.

There are certain things in there that—all of the Internal Revenue personnel are governed by what is in there, of course, but it primarily is for the Technical organization.

There are some in there that concern the field.

Q. Does it contain guidelines or instructions to Internal Revenue personnel in the national office with respect to requests for rulings?

A. Yes.

Q. It does?

A. Yes.

Q. And does it instruct them how they are to proceed—

A. Right.

Q. —in connection with responding to a request for ruling?

A. Yes.

Q. And Chapter 700, does that contain instructions or guidelines with respect to how to handle requests for technical advice?

A. Right, yes.

I might mention that at this point there is no procedure in Chapter 700. We are developing it right now, and there is a group working on it, of which I am one.

In other words, it is being drafted. There is no material in Chapter 700.

Q. Chapter 700 doesn't exist yet?

A. It exists, but we have a comment in there that this material is being drafted because in other chapters we refer to 700, and so anybody that looks there sees there is a text material that says this text material is being drafted.

If we hadn't had a new Assistant Commissioner last spring, we probably would have had it out by now, but there has been—

Q. Part 600 is in final form though, Chapter 600?

A. There are changes going on all the time, but Chapter 600 is complete as of now.

Q. Does Chapter 600 itself contain any reference to the already existing files of rulings?

A. Yes.

It tells you that that form, M-3514, is an exhibit in Chapter 600, and there are certain questions on there that concern the files.

Q. Right.

But does it contain instructions or suggestions to the personnel with respect to how they should make use of the existing files of rulings?

A. I don't think 600 says so. I don't think there is anything in 600 that tells them how to use the files, no.

Q. Is there anything anywhere in Part XI which tells them how to use the files?

A. Yes.

We have a section on research facilities.

Q. And what chapter is that in?

A. That would be in Chapter 200.

Q. I see.

A. But Chapter 200 has a number of sections to it of miscellaneous materials if it doesn't fall into any of the other chapters.

Q. Does Chapter 200 have any material on how to use rulings files, and by rulings files I refer to the general rulings files of letter rulings and also to the digest card and reference card system?

A. It just says they are available. It doesn't—

Q. Does it describe them?

A. Yes.

Q. It does describe them?

A. Yes.

Q. And it says they are available to be used?

A. Right, yes.

Mr. Dobrovir: Do you have any objection to making the relevant sections that we are talking about part of the record, Mr. Lombardo?

Mr. Lombardo: I will have to think about that.

Mr. Stratton: I don't think they have decided whether or not—

The Witness: Can I say something off the record?

Mr. Dobrovir: Off the record.

(Discussion off the record.)

Mr. Dobrovir: Back on the record.

By Mr. Dobrovir:

Q. Turning your attention to what I would describe, I guess, as the general file of letter rulings, could you describe what that file is physically to start with?

A. Well, there is not one file. Our Records Section consists of a number of files.

There is a file on revenue rulings and revenue procedures. In other words, every revenue ruling has a file.

You ask for a revenue ruling by number.

Say you want to see Revenue Ruling 69-172. They go to a certain section in the file room, and all the files are there numerically by revenue ruling number.

Then there is a Technical and General Correspondence file, and this file contains records from all the ruling branches in Technical, of which there are ten, and from our Technical Section that answers miscellaneous correspondence.

All this is in one big file. The ruling files are broken down by the ten ruling branches. Each ruling branch has its own section in this file room, and the reference files are in one place and the routine files are in another place.

So you have a number of files. You don't have one.

Q. The routine file is broken down by the ten rulings branches, and the reference file is also broken down by the ten rulings branches?

A. Yes.

Q. Could you list the ten rulings branches for us?

A. We have the Actuarial Branch, Administrative Provisions Branch, Estate and Gift Tax Branch, Exempt Organizations Branch, Excise Tax Branch, Pension Trust Branch.

They are all in the Miscellaneous and Special Provisions Tax Division.

We have the Corporation Tax Branch, the Engineering and Evaluation Branch, Individual Income Tax Branch, and Reorganization Branch, all in the Income Tax Division.

Q. Now, let's take the routine file.

How many file drawers are occupied by that file?

A. Well, we don't have file drawers. You have sections like that (indicating).

The files are in sections like that.

Q. In other words, they are stored sideways?

A. Yes, sideways, laterally.

Q. Could you give us an estimate of the magnitude of those files, let's say, in linear feet?

A. Well, let's see.

They are in rooms like this (indicating).

Q. Could you describe this room for the record?

A. I was talking of the number of bays. I would say there are about ten bays.

A bay would be from that partition to about here (indicating).

Q. Could you estimate it in feet, because the record won't show this (indicating)?

A. You want a total number of square feet in all the rooms?

Q. Just any kind of dimensions. That would be most helpful.

Mr. Lombardo: Perhaps you can say how high the bay is and how long each bay is.

The Witness: It goes up to the ceiling.

Mr. Lombardo: How high is that, ten feet?

The Witness: Well, there are about ten rooms, I guess.  
By Mr. Dobrovir:

Q. Ten rooms, and the files cover all the walls of each one of these ten rooms?

A. They run across this way (indicating).

Q. They are on shelves?

A. Let me call the Records Section Chief. He may be able to tell me how many linear feet he has.

Mr. Dobrovir: Off the record.

(Discussion off the record.)

Mr. Dobrovir: Back on the record.

By Mr. Dobrovir:

Q. Could you give us an estimate of the magnitude of the routine and the reference file systems?

A. 6,760 linear feet, and that includes other files besides reference and routine.

For example, historical, closing agreement files, that is all included in that.

Q. And could you give us an estimate of how much of that 6,000 whatever it was—

A. 6,760.

Q. —linear feet are taken up by the routine and reference files?

A. No, I couldn't.

Q. Is it more than half?

A. I don't know.

For example, the Exempt Organizations Branch only has historical files in it.

Q. It has no routine rulings files?

A. No.

They keep everything because they found out they have to, and everything is in the historical file.

Q. So their rulings are all in their historical file?

A. Right.

But that doesn't mean that they are all indexed digested.

Q. I am aware of that.

It is only the reference files that are index digested.

Can you give us an estimate with respect specifically to the reference files, or are they all mixed up with the routine files?



A. No, the reference files are separate from the routine files.

Q. Could you give us an estimate on the reference files out of that 6,760 linear feet?

A. Well, it would be a pure guess. It wouldn't be an estimate of any kind.

I have gone into these files many times. But if you want a guess, I would say 2,000 feet for reference.

Q. Two thousand feet for reference?

A. Because I think there is less reference than there are routine and others such as historical. And it might be an overstatement. It might be overstating it.

Q. And you would say the routine files take up more space than the reference files do?

A. Right.

Q. So if it is 2,000 feet for reference, it is something more than that for the routine?

A. And historical and closing agreements and so forth.

Q. Let's try to leave out the historical and closing agreements for a minute.

But if it is 2,000 feet for reference, it might be, would you estimate, 3,000 feet for routine?

A. At least.

Q. At least.

So, the routine and reference files together, in your estimate, do take up the majority of the 6,760 linear feet?

A. No, because Exempt Organizations historical file is fairly large and maybe 2,000 feet for reference is overstated.

If you want the figures on that, I will have to call the Records Section Chief again, because I am not that familiar.

Like I say, I have been in there a number of times, but I don't know how many feet are set out for each file.

Mr. Dobrovir: Why don't we do that and we will continue the deposition while he is getting us those figures, go off the record, and ask him those questions.

(Short recess.)

Mr. Dobrovir: Back on the record.

By Mr. Dobrovir:

Q. How many people are employed in maintaining these files?

A. Sixteen.

Q. Sixteen people.

What is the highest grade of the persons in that position?

A. I will have to ask the Section Chief when I talk to him. He is the highest grade. I think he is, but I would rather ask him.

Q. Now, the maintenance of these files, is that under your supervision?

A. No.

Q. It is not under your supervision?

A. I am in the branch that the Records Section is in. There is a Records Section Chief and he is in charge of that. That is under our Branch Chief.

Q. And you are under the same Branch Chief that he is?

A. Right.

Q. Do you know how many people consult these files on a daily basis or every day how many people consult these files?

A. No.

Mr. Lombardo: May I interject.

Would you be specific as to what files?

Are you talking about routine files or are you just talking generally about all files?

Mr. Dobrovir: I wanted to find out if he has any knowledge, and then I was going to go on and be more specific.

We would like to know how many people consult the routine files each day on the average, and how many people consult the reference files each day on the average.

We also want to know where those people come from.

For example, are they from the Chief Counsel's office or are they from the rulings branches.

The Witness: Excuse me.

Mr. Dobrovir: Off the record.

(Discussion off the record.)

Mr. Dobrovir: Back on the record.

By Mr. Dobrovir:

Q. Do you have now an answer to the question I have asked previously?

A. Yes.

Mr. Lombardo: Before you answer the question, I want the record to show that this witness is relating this information from some third person and it is not of his own knowledge.

By Mr. Dobrovir:

Q. Would you tell us where you are getting this information from, Mr. Simmons?

A. From the Chief, Records Section, Vincent Keller.

Q. Can you give us a breakdown of the magnitude of the routine and reference files?

A. The reference file is 2,280, and in the routine file there is 4,480.

Historical and other files are all mixed in with these.

Q. Can you give us—

Mr. Field: Are those feet?

By Mr. Dobrovir:

Q. Are those linear feet of shelf space?

A. Right.

Q. Were you able to ascertain the grade levels of the people in that position?

A. Well, the grade level runs all the way from Grade 3 on up to Section Chief, who, I think, is an 11. I am not sure.

Q. And there are 16 people?

A. With one vacancy.

Q. Have you been able to ascertain how many people use these files?

A. On an average, 2,000 a month.

Q. An average of 2,000 a month.

Can you break that down by where they come from within the Service?

A. They don't know.

Q. They don't know.

Excuse me a minute.

Do you know whether these people come mainly from the national office?

A. Definitely.

Q. Now, focusing on the routine file, is there any kind of an index system?

A. No.

Q. If someone wants to find a ruling in the routine file, how would he do so?

A. He would have to know the taxpayer's name or the name of the case.

Q. And how would he find that out?

A. I don't know.

Q. Do you have any program for disposing of the material in the routine file?

A. Yes.

Q. And what is that program?

If you refer to something, Mr. Simmons, would you just state for the record what you are referring to?

A. Records Control Schedule 110, routine files are arranged in four-year blocks, and we dispose of a block after four years.

Q. How are the files arranged on the shelves?

A. By branch.

Q. But chronologically?

A. Alphabetically.

Q. How do you know a file is four years old?

A. They are arranged in four-year blocks.

Q. Within the alphabet?

Maybe you can explain this. I don't quite understand it.

A. Well, if you start in 1968, for a four-year block you would run 1968 through 1972, and at the end of 1972 you wouldn't immediately dispose of that block because some of the files would just be a few days old.

But that block would be disposed of after four years.

So, in 1976, I would say that entire group of files would be destroyed.

Q. Is that setting there on the shelf in one segment?

A. Right.

Q. And within that block it is filed alphabetically?

A. Right.

Q. So, in fact, the file is under, say, the Rulings Branch, let's say the Estate and Gift Tax Branch, and then you have files 1964-68 in one block filed alphabetically, and then 1968-72 filed alphabetically?

A. Right.

Q. And now it is 1972 and you are about, or you have just gotten rid of—

A. Of the '64-68.

Q. —the '64 to '68 block. I see.

When you dispose of them, are they burned or are they sent away somewhere?

A. I don't know.

Q. You don't know what happens to them?

A. I know they are sent to the Records Center for disposal.

Q. They are sent to the Records Center?

A. The Federal Records Center.

Q. You don't know if the Records Center keeps them?

A. No, they don't keep the routine ones. They destroy them.

Q. Do you have a program for disposal of the reference files?

A. Yes.

There is a program for disposal.

Q. Could you tell us what that program is?

A. Well, it is very detailed.

There are a number of breakdowns. In general, the files are disposed of after 40 years except selected records determined to have archival value which shall be transferred to the National Archives.

Q. Those are the reference files?

A. Yes.

Q. So there is a separate special program with respect to the reference files?

A. Right.

Q. How long has the reference files been maintained?

A. Well, I guess since 1913.

Q. Do you know that for a fact?

A. It started—this file that we now have was built up from 1952 from a number of different offices in the Internal Revenue Service. They came together into the technical organization, and each one of them brought their files with them.

These files go back—in fact, I was just looking at an index digest card this morning that was dated 1918.

So, I would assume that the files were started back in those days.

Q. But these were individual branches or office files which were gathered together in 1952?



A. When the Technical organization was created in 1952, a number of offices under Deputy Commissioners were brought together, the ones that did the rulings, the regulations work for those Deputy Commissioners came into Technical, and it was one organization, and these files were brought all together at that time.

Q. And at that time was it then called the precedent file?

A. Right.

Q. It first acquired the name precedent file in 1952?

A. No.

Q. But it existed prior to that but scattered around?

A. Wait a minute.

I don't know whether it had the name precedent before that or not.

It was just—I don't know whether the old Income Tax Unit file was called the precedent file or not.

Q. And were the rulings that were included in that file stamped precedent?

A. Yes.

Q. And were they stamped—did they carry this stamp prior to 1952 when they were gathered together?

A. I don't know.

Q. You don't know?

A. Not for sure.

Q. Was there any reason, to your knowledge, for gathering these files together in a single precedent file?

A. It was a continuation of the old files. The Income Tax Unit, the Miscellaneous Tax Unit brought their files together and, of course, the Income Tax Unit files were in the income tax area; the employment tax files were in the employment tax area; the excise tax files were in their area, but they were all in one unit, the Records Section.

Q. What was the purpose for maintaining the precedent file?

A. To have—at that time prior to 1952, they had issued copies of their rulings to the field to use, but starting in 1952 they didn't do it any more.

Q. They stopped it?

A. They stopped sending them out and started issuing revenue rulings at the beginning of 1953.

Q. And was that the reason why they put together this precedent file in the national office?

A. For what reason?

Q. Because they stopped issuing the rulings to the field.

A. No.

Q. Well, I am trying to find out why this precedent file was maintained.

What was the reason for maintaining this file?

A. Good business practice. You don't destroy your files. They keep having historical value and research value.

Q. But there was a distinction made between the precedent files and the routine files, is that not so?

A. Right.

Q. What was the reason for establishing that or for maintaining that distinction?

A. Well, the precedent files would eventually result in published rulings.

Q. It was expected that everything in the precedent file would eventually be published?

A. At that time, I was not that closely connected with it, but I would assume they had a form at that time where they indicated publication or non-publication.

If they indicated publication, it went to the precedent file. That would be my belief at this time, but I don't know. I wasn't that close to it.

Q. Is that what happens today?

A. Yes.

Q. I suppose this would be a good time to get into Form M-3514.

Now, this was Exhibit A to the deposition of Mr. Steinbuchel.

You have a copy of Form M-3514 before you?

A. Right.

Q. Could you tell us what this form is used for and how it is used?

A. A copy of this form is placed on incoming correspondence by our Communications Section, and it travels with the case wherever it goes until the outgoing correspondence is mailed.

It is then placed in the closed file of the Records Section, and along the way the people working on it indicate or check various blocks on here to indicate what they recommended.

Q. Well, let's go through this.

Now, the form contains a block for publication recommended, and that is No. 4?

A. Right.

Q. And the person working on the ruling is supposed to check either yes or no?

A. The person to whom the case is assigned indicates his recommendation by checking yes or no, that's right.

Q. And he is supposed to follow, in making that determination, and I am quoting from the back of this form, "Publication standards in Policy Statement P-(11)900-1."

Could you briefly tell us what those standards are?

A. They are published in Revenue Procedure 72-1, IRB No. 1972-1, January 3, 1972.

Q. Could you just summarize it for us?

A. Well, the shortest way to put it is that it is the policy of the Internal Revenue Service to publish all rulings and other communications to taxpayers or field offices involving substantive tax law or procedures affecting taxpayers' rights or duties except those involving, and then there are six exceptions:

One, issues specifically and clearly covered by statute or regulations.

Two, issues specifically covered by rulings, procedures, opinions or court decisions previously published in the Internal Revenue Bulletin.

Three, issues not likely to arise again because of unique or specific facts.

Four, determinations of fact rather than interpretations of law.

Five, informers and informers' rewards.

Or, six, disclosure of secret formulas, processes, business practices, and other similar information.

Now, there are two other exceptions in there that relate to alcohol and tobacco tax matters that have been transferred from Internal Revenue to another department. And if you read Revenue Procedure 72-1, you will find those two exceptions in there that no longer apply to the Internal Revenue.

Q. I notice on the form, under 4, there is a list of categories, A through H?

A. Right.

Q. Some of which were included in the things you just mentioned?

A. Right.

Q. One of them which is not is C, issues specifically covered by an open revenue ruling project.

What is that?

A. Well, if you are working on a proposed revenue ruling, and another letter ruling case comes along that is similar or the same as the open revenue ruling jacket, then this new case would be associated with the open revenue ruling project so that you wouldn't be issuing two or three revenue rulings all on the same thing.

Q. So, in other words, a determination has already been made to issue a revenue ruling on this particular subject matter?

A. Right.

Q. But it has not yet been issued?

A. Right.

It is in the process of being developed.

Q. About how long does it take from the commencement of an open revenue ruling project until the ruling is issued?

A. Well, I went over to our files the other day and made a little record of some of them.

Revenue Ruling 72-515 took three months. The letter ruling was issued July 19, 1972, and the revenue ruling was issued October 24, 1972.

Revenue Ruling 72-462 took six months. The letter ruling was issued April 10, 1972, and the revenue ruling, October 2, 1972.

Revenue Ruling 72-414 took one year and three months. The letter ruling was issued May 27, 1971, and the revenue ruling, August 28, 1972.

So, it varies from a few months to over a year.

Q. I see.

Now, while an open revenue ruling project is going on, if a request for a ruling comes in that is covered by that project, is there some way in which the person working on the case is informed of that?

A. Not unless he knew or had worked on the other one that he recommended for publication; but as it goes through the review process, it would come to somebody's attention, especially if it was recommended for publication.

When it got to the Project Section, they would know they had a revenue ruling project open and would recommend it be associated.

Q. In connection with issuing the particular letter ruling that is involved, would there be a decision made in the review process to have that letter ruling conform to the other letter rulings that had already been issued in that same project?

A. Well, if the same issue was involved, it should have the same answer, and it is up to the reviewers to see that it does.

Q. In other words, they maintain uniformity?

A. Yes, right.

Q. And that is not unique to open revenue ruling projects, I don't suppose?

A. No.

This is for everything. Even a routine ruling should be—

Q. They always want them to come out the same?

A. As close as possible.

Q. Well, how do you make sure they come out the same? What do you do?

A. This is up to the reviewers and the Branch Chief to see that they do.

Q. Do you know how the process works?

A. I guess it depends on the reviewers' knowledge. He is the expert in that area, and if one of the Tax Law Specialists under him writes a reply that is not consistent with what has gone out before, he would want to know why.



Q. Do they use the rulings files to make sure that they are being consistent with what has gone out before?

A. I don't know. I would say I don't think so because they couldn't go up to our Records Section every time they had a ruling to check to find out if this is what is going on.

They use their expertise and the knowledge that they have.

Q. In other words, they already know because they have been working in the field and know what has gone out before?

A. Yes, that would be my opinion.

Q. But the rulings files are there for them to use if they need them?

A. Yes.

The files are there for anyone in Technical to use.

Q. You mentioned before that about 2,000 people a month use those files.

What do they use them for?

A. Well, in some instances they would have a request from the same taxpayer and wanted to get the file out for that.

They may have found something that was similar to what they were working on and they wanted to associate it with the current case.

Q. About how many of those people actually use the index system?

Mr. Lombardo: I am going to make an objection to that. I don't believe this witness has that much knowledge about it.

You are asking him to speculate.

Mr. Dobrovir: We have had a very useful procedure in which when he doesn't know the answer to the question,

he can call up the people who do know the answer to the question. And I would be happy to continue to follow that procedure.

Mr. Lombardo: I don't want the deposition to indicate this man is testifying from his own memory.

He is just guessing.

Mr. Dobrovir: It is indicating when he gets information from the someone else, where he gets it.

Mr. Lombardo: I suggest the witness answer if he knows. If he doesn't know, I don't think he ought to speculate.

By Mr. Dobrovir:

Q. Do you think you could get an answer to the question of how many of those people actually use the index file?

A. Well, Mr. Keller said he didn't know how many used it.

Q. He said he didn't know how many used the index file?

A. Pardon me. I misunderstood your question.

Q. Of the 2,000 people who use the rulings files in the month, my question is, can you find out how many of those people use the index system?

A. I can find out how many people go in our Research Facility Section.

Whether they use the index digest card or not, or whether they go to some of the other books there, I don't think anyone would know.

Mr. Dobrovir: Perhaps you could find that out for us. Off the record.

(Discussion off the record.)

Mr. Dobrovir: Back on the record.

By Mr. Dobrovir:

Q. Have you been able to ascertain how many people use the index card system?

A. Well, on the average of four or five hundred a month.

Mr. Dobrovir: Thank you.

Mr. Lombardo: Let the record show, please, where you got the information.

The Witness: It was obtained from Miss Josephine Murphy, Chief, Research Facilities Section.

By Mr. Dobrovir:

Q. Do you know why these four or five hundred people a month use the index system?

A. No.

Q. Now, continuing on with this form, we look on No. 6 and the first box to be checked is revenue ruling or procedure.

What does that mean?

A. Well, if a file results in a revenue ruling or revenue procedure, then the file is filed in that portion of the Records Section that contains the revenue rulings file.

Q. So that would mean it is either part of an open revenue ruling project or it is being marked, yes, publication recommended?

Do those things go together?

A. When it is finally determined that this is going to be a revenue ruling, they indicate here as to where the file should go, into which category.

Our Records Section people do not make the determination. Our technical people make the determination as to what kind of file it goes in.

Q. In other words, the man working on the case?

A. Yes.

Q. And he marks revenue ruling or procedure?

A. Right.

Q. The next box is reference.

What is the standard for a document filed reference?

A. If the case file has such significant future reference value because of the issues involved that it should be indexed by the Research Facilities Section, even though it does not meet the publication standards.

Q. Could you tell us what you are reading from?

A. Part XI of the manual.

Q. More specifically?

A. (11)633.82.

Off the record?

Mr. Dobrovir: Yes.

(Discussion off the record.)

Mr. Dobrovir: On the record.

By Mr. Dobrovir:

Q. Why don't you state for the record that it is on the form?

A. That information is on the reverse side of the form under instructions, Form M-3514.

Q. That instruction, which is Item 6(b), goes on and says, "that it should be indexed by the Research Facilities Section even though it does not meet the publication standards," and then it says, "Item 6(a) or 6(b) is also marked X to indicate the reason for classifying the case file reference."

Then it says, "The reference box is marked in relatively few cases."

Turning back to A and B, A says for future reference on same or similar issue where Item 4C, D, E or F is marked X. What does that mean?

A. Well, when you check any one of those subparagraphs, C, D, E or F, then the file has some future reference value because of its connection with future cases.

Q. C, D, E and F are reasons why publications should not be recommended?

A. Exactly.

If you want to retain the file, the only way you can keep it without it being destroyed is to put it in the reference file.

Q. The reason for having it in the reference file is so people can refer to it in the future?

A. Right.

Q. When they have the same or a similar issue?

A. Right.

Q. So they can know what the decision was before?

A. No.

If it is checked reference, it will be index digested.

There will be a card on it. So when they go to the Code Section it concerns, this file would be available by name.

So there is some value that the person working on the current case has in wanting to retain it when he checks Items C, D, E or F.

Q. He wants to retain it not merely for himself or for other people?

A. Right.

He figures that there is some future reference value to it, and this has to be concurred in by the reviewers all along the line.

Q. I see.

The reviewers all the way up the line have to concur in putting something in the reference file?

A. Right.

Q. I see.

Now, do you have any knowledge of how many of the items which are marked reference—how they are split up among those which are C or D or E or F?

A. No.

Q. You don't know that.

Who would know that?

A. I don't think anybody would know unless they went and looked at all the cards.

Q. I see.

In other words, the reviewers don't keep any track of that?

A. I don't think any statistics are kept as to how many items are checked A, B, C, D, E or F.

Q. The next thing that is referred to is 6B which says important research material in file.

Is that a reason for marking something reference?

A. Yes, it could be.

Q. And what would that be?

A. Files along the line that Mr. Steinbuchel—for example, if somebody made extensive research on an issue, and all the information was there, then they would want to retain it and have it available for other people.

Q. I would like to go on now to Item 7 on this form.

First, it says classification of any prior reference files having indistinguishable facts and contrary position.

Now, what is this—then it has A, transfer to routine or historical files, and B, retain as reference file.

Then, on the back, Item 7 has instructions, and it says, "See IRM (11)633.82:(6) for instructions as to entries in this item if the position taken in the current case is contrary to the position in a prior reference file having indistinguishable facts."

Could you tell us what this group of boxes and instructions is intended to deal with?

A. First of all, the reference should be to paragraph (7). This is a misprint.

Second, the only reason the instructions aren't on the form is we didn't have enough room, so we had to refer our people to the manual which has them.



Item 7 is completed only in cases in which the position taken in the current case is contrary to the position taken in a reference case or cases and in which the facts are indistinguishable. Somebody has made a mistake somewhere; a law has been changed.

Q. What happens at that point?

A. Then the person working on the current case indicates that the prior reference file should be transferred to routine or historical. And if that is the case, that is the final decision upon complete review, then when this form and the file get back to the Records Section, the people there use this information to take the case out of reference and put it into routine or historical, depending on what happened.

Q. So that is if the second decision is decided to be the right one?

A. Yes.

Q. What happens if, after looking at the reference file, the old decision is decided to be the right one?

A. Well, then the current case would be filed with the same thing.

In other words, that is still the position of the Service. There wasn't any change in law or anything else.

Q. In other words, the position of the second ruling would be changed to conform to the earlier reference ruling?

A. Right.

Mr. Stratton: I think you sort of put words into his mouth by phrasing that last question.

The Witness: Repeat the question.

Mr. Stratton: It was confusing to me.

Mr. Dobrovir: Let me try again.

By Mr. Dobrovir:

Q. If the second ruling is checked as having a contrary position to an earlier reference ruling, and it is decided in the review process that the earlier ruling is correct, then the later ruling, the one that we are going through, would be changed to conform to the earlier reference ruling?

Mr. Lombardo: I object.

I think there is an assumption in there that there is no testimony to.

In other words, the form says that if you come to a contrary position from an earlier one, then you have to indicate what is to happen to the earlier one.

But the contrary statement is not there. That is, if it happens that you come up with a position that is contrary to an earlier ruling, you have to change it back to the earlier ruling.

You are assuming that can occur. I don't think there is any testimony it is possible.

Mr. Dobrovir: That is exactly what my question is designed to find out.

Let me ask the question again.

By Mr. Dobrovir:

Q. Let us suppose that the person working on this case, having found a prior reference ruling, comes to a position contrary to the prior reference ruling.

Now, you testified, I believe, that sometimes the review process determines that the two rulings being contrary, the prior ruling was correct and should prevail.

Isn't that true?

A. Yes, that is true.

Q. My question is, when that determination has been made that the prior ruling is correct and should prevail, is the second ruling, the ruling that is being worked on, made to conform to the prior ruling in its result?

A. I would think it would. We are being uniform. So, therefore, it would.

Q. You would not issue a ruling that is contrary to the prior ruling if the prior ruling has been determined to be the correct one?

A. Definitely.

Q. Thank you.

Now, if the prior ruling and the new ruling are contrary on indistinguishable facts, what would be the standards or criteria for determining that the prior ruling should be changed and that the new position of the Service should be the subsequent ruling?

A. I don't know. I could only surmise as to what that would be.

Q. Now, Mr. Simmons, are you in charge of preparing revenue rulings for publication?

A. No.

Q. You are not?

A. No.

Q. Do you have any functions at all in connection with the publication of revenue rulings?

A. No.

Q. So, all of your functions have to do with the manual?

A. Procedure, right.

Q. Now, are you familiar with the role of the Chief Counsel's office in the rulings process?

A. Yes, in a general way, what would relate to our procedures.

Q. What is the role of the Chief Counsel's office in the rulings process?

A. Like anyone else, asking for legal advice.

Q. What would be the criteria for asking for legal advice on a ruling?

How would, say, somebody in one of the rulings branches decide he wanted advice from the Chief Counsel's office?

A. Well, we have certain standards and they are in Part XI, but I don't know whether I can tell you what they are at this time until we decide whether Part XI is available or not.

Mr. Dobrovir: Would Mr. Lombardo like to comment on whether the witness can discuss that?

Mr. Lombardo: I think the same restriction applies on that as applied on the other part of the manual.

Mr. Dobrovir: We will wait and see.

Mr. Lombardo: Yes.

By Mr. Dobrovir:

Q. Mr. Steinbuchel testified that when a General Counsel's memorandum is issued in a case, he regards it as binding upon him and that it would always be followed.

Are you familiar with the process by which a General Counsel's memorandum is issued in response to a request?

A. I know that they are issued. I am not that closely connected with it.

Q. Do you know whether the issuance of a General Counsel's memorandum is one of the factors that would require the publication of a revenue ruling in that area?

A. No, I don't know.

Q. Have you taken a look recently at the index card system, Mr. Simmons?

A. Yes, I have looked at it.

Q. How recently have you taken a look at the system?

A. Nine o'clock this morning.

Q. And how thorough was your look?

A. I just looked at one code section.

Q. What code section was that?

A. 71(a) on alimony.

Q. Would you say that in addition to your look this morning you have a reasonably good familiarity with the contents of the system, the index card system?

A. Yes.

Q. Could you describe what appears on an index card?

A. It has got at the top, 1954 code, if that is the year of the code you are working on, has the taxpayer's name or other identification in the upper left corner.

In the upper right corner, it has the code section number, has the date, and in the center of the card it has a resume, a digest of whether it was, a court case or letter ruling, technical advice, and whatever it happened to be that was digested.

In the lower left corner, or on the back of the form, if necessary, at the end of the digest it has the organizational symbols of the people who issued that thing, and then it has notations at the bottom as to whether publication was recommended or not, and other pertinent information of various kinds.

Q. How many of those cards have any indication that another agency of the Government was communicated with in respect to that matter?

A. I don't know.

Q. On the basis of your familiarity with the card file, would you care to make an estimate?

A. No.

Q. Is it very few?

A. I couldn't even say.

Q. Are you familiar with any cards which have such a notation?

A. With another Government agency?

Q. Yes, sir.

A. That excludes Chief Counsel?

Q. Yes, sir.

A. I am sure that there are certain occasions that way, but I have never seen a notation that another Government agency has been—we write to other Government agencies.

So if that were the case that was decided, then that fact would be on the card. In other words, it would be up as a name, HEW.

Q. It would be HEW as the agency requesting the ruling?

A. Requesting the information.

Q. I see.

But if this were a card that referred to a ruling, a letter ruling, it would just have the taxpayer's name on it, not the name of an agency?

A. Right.

Q. Do you know approximately how many rulings each year are issued in response to a request by another agency of the Government?

A. No.

Q. Is it very few?

A. I would say yes, it is few in comparison to the total number issued.

Q. And are any of those rulings ever published?

A. I don't know.

I have never seen the card or know whether the ruling was published as a result of a request from another agency or not.

Q. Now, in your affidavit which was filed in this matter back in September, in referring to the digest cards in paragraph 5 of your affidavit, you say, "Many of these cards contain the names and addresses of taxpayers and confidential taxpayer information as well as interagency opinions, reasoning or conclusions."



What is the confidential taxpayer information that is included on the card?

A. I guess it was by chance that I looked at the alimony section 71 this morning, but one of the rulings in there I saw had to do with the husband claiming a deduction for alimony, a wife not including it as income.

The reason she didn't include it as income was because she said while they were separated, they still cohabited, and that was the basis for not reporting it as income.

I think this falls in the category of confidential taxpayer information.

Q. That kind of thing is unique to the alimony section, is it not?

A. Yes.

Well—

Q. At the time that you prepared your affidavit, before you had looked at the alimony section, what did you intend to mean by confidential taxpayer information?

A. Personally, I think anything the taxpayer tells the Internal Revenue in a request for a ruling is confidential.

It is not up to the Internal Revenue to tell a third party anything about that request at all, no matter how innocuous it may appear.

Q. In this sentence you go on to say, in discussing what these cards contain, "They contain interagency opinions, reasoning or conclusions."

What does that refer to?

A. Well, it would have in there if Chief Counsel had any comment to make on it. It may have some comment by a reviewer that was pertinent to it.

Q. How many of the cards which index letter rulings contain a reference to the Chief Counsel's opinion?

A. I don't know. I would have no way of knowing.

Q. Well, when you wrote this affidavit, you said that many of these cards contained that.

Mr. Stratton: Could you repeat that? Contained what?

Mr. Dobrovir: Interagency opinions, reasoning or conclusions, and among those the two examples Mr. Simmons cited were opinions from the Chief Counsel's office and comments by reviewers.

I am going through these two items one at a time, and I am asking how many of the cards contain reference to opinions of the Chief Counsel.

The Witness: I don't know how many were there. If the request had gone to Chief Counsel, then that information would be on the card.

By Mr. Dobrovir:

Q. Well, when you wrote this affidavit, did you write it on the basis of an examination of the card file?

A. No.

Q. You did not.

On what basis did you make this statement?

A. Just general knowledge of things that are in it.

Q. General knowledge?

A. I have not counted the cards or looked at all the cards to see that more than 50 percent of them contain this type of information.

Q. When you prepared the affidavit and in connection with its preparation, did you go and look at the card file system?

A. Not immediately before preparing this, no.

But I had looked at it over the years, been down there many times.

Q. So this was based on—

A. General knowledge of the system as I have seen it.

Q. Can you tell us how many of those cards, in fact, contain a reference to the comments of the reviewer?

A. No.

It is on the same basis.

Q. Now, turning to paragraph 6 of your affidavit, you say in connection with the reference file the use of the term precedent was discontinued prior to the period July 26, 1968, for which plaintiffs seek records.

When was the use of the term precedent discontinued?

A. In 1967.

Q. And what was the reason for discontinuing the use of that term?

A. The Freedom of Information Act.

Q. Would you explain that?

A. Well, in looking through the file, the term precedent was not applicable.

The word reference more aptly explained the file.

It probably should have been changed before that because it wasn't a true precedent file.

Q. The word precedent had been used since 1952?

A. Nobody had bothered to change it. It was just one of those things that continued on until—

Q. And how the Freedom of Information Act cause you to change it?

A. Because I guess there are things in there that were not precedent, and precedent had to be published.

Q. So, in other words, when the Freedom of Information Act was passed, you changed the name of the file so that it wouldn't be covered by the Freedom of Information Act, is that correct?

A. No.

We just changed the name of it. The name reference is more applicable than the word precedent.

Q. Who was involved in deciding to change the name?

A. I guess practically everybody in Technical from the people working on the drafting to procedures up to the Assistant Commissioner who made the final decision.

Q. So the Assistant Commissioner did make the final decision?

A. Yes.

Q. Prior to the passage of the Freedom of Information Act, was it a matter of discussion in your office?

A. I don't think anybody ever thought about the word precedent until the Freedom of Information Act came in.

Q. No.

My question was, was the Freedom of Information Act itself, or the bills that were pending in the Congress, a matter of discussion in your office?

A. Not to my knowledge, not before 1967.

I became involved in early '67. Before that, I don't know.

Q. How did you first become involved with the Freedom of Information Act?

A. Well, I was made the representative from my division to be on the group that was working on any changes we had to make as a result of the Freedom of Information Act.

Q. Was this before or after the passage of the Act?

A. It was passed in July of '67, and this was a few months before that.

Q. And what did this group do?

A. Well, we had to look through all of our procedures, policy statements and everything else to see what could or could not be made available under the Freedom of Information Act, whether it was exempt under any of the nine exemptions.

Q. This was before the Act was finally passed, is that correct?

A. Yes.

Q. Was there any—

Mr. Lombardo: Let me interject.

I think you are confusing the witness.

The original Act was passed in 1966. It didn't go into effect until 1967.

Mr. Dobrovir: I am sorry.

I got the dates wrong. Let me go back.

By Mr. Dobrovir:

Q. Are we talking about 1967 after the Act was passed or 1966 before it was passed?

A. It was passed in '66, to be effective July 4, 1967?

Mr. Field: Right.

The Witness: This was in early '67, I guess, that I became involved.

By Mr. Dobrovir:

Q. So this was after the Act had been passed?

A. But before it became effective.

Q. And what did your group do?

A. There was an Internal Revenue group. I was part of the group for Technical, and everybody went over their records to see what would or would not be made available under the Freedom of Information Act, just how we stood.

Q. And it was in the course of that process that the decision was made to change the name of the precedent file to reference?

A. That was one of the things, yes.

Q. Was one of the decisions made to restamp all of the rulings in the file?

A. That was done as the files—we didn't go through all the files right away and change it. But as that file was pulled out for some reason, the Records Section would change the stamp.

Mr. Dobrovir: I am going to show you a document which we will make Exhibit A to your deposition.

(The document referred to was marked for identification as Exhibit A.)

Mr. Dobrovir: I only have the one copy because of a reason you will see.

It is a letter ruling, Exempt Organizations Branch, from the District Director in Manhattan to something called Tax Foundation, Incorporated. It is dated November 16, 1965. And it has on its face at the bottom a stamp, "Reference, Internal Revenue—Technical," and it has next to that a blocked out stamp which is very difficult to read. It seems to have been over stamped.

By Mr. Dobrovir:

Q. Do you think you could look at this and tell us what is under the over stamped block on the right-hand side?

A. Can I talk to my attorney?

Mr. Dobrovir: Of course, on the record.

The Witness: What is that?

Mr. Lombardo: That is all right. You don't have to confer with us.

Mr. Stratton: I think we should object to introducing this as an exhibit.

This is a confidential private letter ruling.

Mr. Lombardo: We are not making it public. He is making it public.

We don't worry about it.

If you know the answer, you can answer the question. If you have seen that document before, answer the question.

The Witness: This stamp was precedent before it was blocked out.

Mr. Lombardo: Are you confident that was so, or was that the practice?

The Witness: That was the practice. I will assume that the word precedent was here before it was stamped reference.

Mr. Lombardo: May I interject.

You can't testify here you have ever seen this specific document before, have you?



The Witness: I have seen this particular—this was made from the official file copy, the yellow copy that is in our official records, and I have seen the actual yellow copy that this was made from.

Mr. Lombardo: How did that come to your attention?

The Witness: Because it is Exhibit 14 in one of the documents filed by Tax Analysts and Advocates.

By Mr. Dobrovir:

Q. You were able to go back and find that file and ascertain there is such a ruling in the files, is that correct?

A. Yes.

I got the name of the taxpayer.

Q. And so you have examined the original document in the file, and it shows that the word precedent was stamped over the word reference stamped on?

A. No.

You cannot see the word precedent. It is a black stamp stamped over it. But our procedure at the time was that the word precedent would be blocked out, and it would be restamped reference.

Mr. Field: You want to give it to the reporter?

Mr. Dobrovir: I am going to give it to the reporter.

I have no more questions, but let the record show that counsel for defendants and I as counsel for plaintiffs have agreed that if Part XI of the Internal Revenue Service Manual is made public or if it is not being made public, and those portions which are relevant to the subject matter of this lawsuit are made available to plaintiffs for the purpose of this lawsuit, then Mr. Simmons will be recalled.

So, for that purpose, and for that purpose only, plaintiffs would adjourn rather than terminate the deposition of Mr. Simmons.

Does that reflect our stipulation?

Mr. Lombardo: That is correct.

The date will be set at some future time.

Mr. Dobrovir: Yes.

If Part XI or parts of Part XI are produced, we will mark them Exhibit B to the deposition.

Mr. Field: If that is agreeable to counsel for the defendants.

Mr. Lombardo: I have no objection to what you mark as an exhibit if it is available.

Mr. Dobrovir: Fine.

Mr. Lombardo: Mr. Stratton will ask some questions.

*Examination by Counsel for the Defendants.*

By Mr. Stratton:

Q. Mr. Simmons, earlier you testified that if there was a prior private letter ruling issued in a certain area, that the new ruling should reflect the same answer.

Is this so because the new ruling should follow the old ruling, or is it so because the principle involved is the same?

If they are identical facts, then the principle should hold true for the second ruling?

A. The principle should hold true uniformly. It would be the same to that extent.

Q. Did you base this answer because the prior ruling should be followed, or is it because the actual principles involved hold true?

A. There is a position we followed, and that prior ruling was based on the position and, therefore, the current ruling should also be based on the same position.

Q. You also, in your affidavit, referring to paragraph 5, said that the card summaries contain certain confidential taxpayer information.

Now, when you made your affidavit, you were referring to this present case concerning section 613(c) of the Internal Revenue Code.

Did you examine the cards pertaining to that section?

A. It wasn't in reference to section 613(c). I was not going by just section 613(c).

I think the date of my deposition—they expanded their original suit to cover more than just 613(c), and I was talking in a general way about the entire index digest file.

Q. But did you examine the cards concerning 613(c)?

A. I have looked at them, yes.

Q. Do some of these cards contain trade secrets or secret processes?

A. Well, I think anything that the taxpayer tells us is confidential or secret as far as that goes.

As to whether there is by legal definition a trade secret or not, I don't know whether there is any such thing as that in the file.

Q. Do some of these card summaries contain, let's say, processes that a certain company would use in mining?

A. Yes, they do.

Q. So, in your opinion, these could be considered trade secrets?

A. Yes. In my opinion, they would.

Q. Do they contain financial figures or figures that would, in your opinion, be confidential?

A. If there were any dollar amounts in there, they would be, in my opinion, confidential.

I can't recall offhand whether there were any actual dollar amounts in those ones in section 613(c).

Q. You also testified that they contained interagency opinions, reasoning or conclusions.

On these cards is there reasoning of the person who prepared the actual private letter ruling contained in the card summary?

A. It was in the digest in a digest manner.

Q. You said also there is the reasoning of the reviewer contained in the digest cards?

A. I don't know. I can't—

Q. Certainly the conclusion of the preparer would be contained in the summary of the digest cards?

A. Whatever was in the digest was the final answer that went out, and that would be everybody's opinion along the line.

Q. Would that contain the reasoning of the preparer and the reasoning of the reviewer?

A. In a digested way, yes.

Q. Plaintiffs' Exhibit A to this deposition was also Plaintiffs' Exhibit 14 you referred to?

A. Exhibit A—was that the M-3514?

Q. Exhibit A was the private letter.

A. Yes, to my deposition, okay.

Same as Exhibit 14.

Q. You said that is a file copy, internal file copy?

A. That is an identical copy of our official file copy, the yellow copy.

That reference stamp and blocked out precedent stamp appears only on the official file copy.

Q. Do you have any knowledge of how that copy could have gotten out of the file?

A. No.

It was, in my opinion, illegally obtained because no one should have this but our Records Section.

Q. That is not a copy that would be issued to a taxpayer?

A. No.

Q. That is an internal file copy?

A. Yes.

Q. Would it be only Internal Revenue Service personnel who would have access to that particular copy?

A. That's right.

Mr. Stratton: No further questions.

Mr. Dobrovir: I have just a few more on redirect.

*Further Examination by Counsel for the Plaintiffs.*

By Mr. Dobrovir:

Q. In response to Mr. Stratton's questions about what is on the card summary, I believe you testified—strike that.

Let me ask you this.

Have you ever seen a card summary in which a technical process was described?

A. Yes.

Q. Was the technical process described in terms of how it worked or was there simply a reference to the fact there was a technical process?

A. Well, it explained in some detail how the process worked.

Q. I see.

Have you ever seen a card summary which had dollar figures on it?

A. I can't say positively.

I am sure I have, but I can't say which one or where I saw it.

Q. If there were a card summary which contained dollar figures, would it be easy to block those figures off if the file were to be made public?

A. No, it would not be easy.

Q. Could it not simply be done with white-out?

A. Then you destroy the card.

Q. Could you make a Xerox of the card and then cover the figures with white-out?

A. Then you can read it from the reverse side.

The only way you can do it is to make a copy of that card and then cut out that figure.

Q. So there is a way to do it?

A. Yes.

Q. Now, you were asked, I believe, whether the cards contained the opinion of the reviewer.

Have you ever seen a card in which the opinion or the comments of the reviewer were identified as such?

A. I can't say that I have.

Q. Do you believe that there are cards in which the opinion of the reviewer is identified as the opinion of the reviewer as distinguished from the opinion of the preparer?

A. I can't answer that. I don't know.

Q. Isn't it usual that the letter ruling itself simply states the conclusion without distinguishing whether it is the conclusion of the reviewer or of the preparer?

A. I would say in general that is right.

Q. Have you ever seen a letter ruling in which the opinion of the reviewer is identified?

A. In the file.

Q. In the letter ruling?

A. Not in the letter ruling to the taxpayer, no. It wouldn't be, certainly not in here.

Mr. Dobrovir: I have no more questions.

Mr. Lombardo: We have no questions.

(Witness excused.)

(Whereupon, at 12:02 o'clock p.m., the taking of the deposition was concluded.)

I have read the foregoing 67 pages, which contain a correct transcript of the answers made by me to the questions therein recorded.

.....  
John F. Simmons

Subscribed and sworn to before me this .....  
day of ....., 197.....

.....  
Notary Public

My commission expires .....



**CERTIFICATE OF NOTARY PUBLIC**

I, Emma N. Lynn, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me stenographically and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

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Notary Public in and for  
the District of Columbia

My commission expires January 14, 1975.

No. 75-679

Supreme Court, U. S.

FILED

JAN 17 1977

MICHAEL KODAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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**INTERNAL REVENUE SERVICE, PETITIONER**

*v.*

**FRUEHAUF CORPORATION, ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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**MOTION TO VACATE AND REMAND  
TO THE COURT OF APPEALS**

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Pursuant to Rule 35, the Solicitor General, on behalf of the Internal Revenue Service, moves to vacate the judgment of the court of appeals and to remand the case to that court to consider the effect of legislation enacted after the grant of certiorari.

This case arises under the Freedom of Information Act, as amended, 5 U.S.C. 552. Exemption 3 of that Act, 5 U.S.C. 552(b)(3), bars disclosure of "matters that are \* \* \* specifically exempted from

disclosure by statute." The question upon which certiorari was granted is whether this exemption covers Internal Revenue Service technical advice memoranda, letter rulings, and other related files because of the prohibition against public inspection of tax returns provided by 26 U.S.C. 6103, where such documents contain information which is either part of or related to returns filed by particular taxpayers.

1. Respondent Fruehauf Corporation manufactures trucks and their parts and accessories. It and two of its officers were charged in an indictment in the United States District Court for the Eastern District of Michigan with: (1) conspiring to defeat the assessment of the federal manufacturer's excise tax imposed by Section 4061 of the Internal Revenue Code of 1954 (26 U.S.C.); (2) attempting to evade excise taxes of \$12,344,587, in violation of 26 U.S.C. 7201; and (3) aiding in the preparation of materially false and fraudulent excise tax returns, in violation of 26 U.S.C. 7206(2). During pretrial discovery proceedings, respondents sought to obtain from the government documents (in the possession of the Internal Revenue Service) which they claimed would supply information essential to their defense. The government contended that such materials were not subject to discovery<sup>1</sup> (Pet. App. A 1A-2A).

<sup>1</sup> After a nonjury trial, respondents were found guilty in July, 1975. William E. Grace, President and Chief Executive Officer, and Robert D. Rowan, Vice President and Comptroller, were sentenced to six months in prison and two years

Respondents thereupon brought this suit in the United States District Court for the Eastern District of Michigan under the Freedom of Information Act (FOI Act), 5 U.S.C. 552. They sought copies of documents prepared by the Internal Revenue Service from January 1, 1947 to September 13, 1973, in connection with its determinations whether particular vehicles were subject to the manufacturer's excise tax, and its computation of the sales price of such vehicles under Section 4216 of the Code. Specifically, respondents sought (Pet. App. A 2A-3A; A. 9-14, 48-49):

(1) all "unpublished private rulings and/or letter rulings" issued by the Excise Tax Branch, Internal Revenue Service since January 1, 1947 to manufacturers of automobile and truck chassis and bodies, involving any of a number of specified determinations with respect to price, constructive price, and coverage under Sections 4216, 4061, and 6416 of the Code;

(2) Internal Revenue Service files, including correspondence, analysis and submissions of fact applicable to 23 published Revenue Rulings;

(3) communications received by the Internal Revenue Service from persons outside the executive branch of the government with respect to the requested private letter rulings;

(4) so much of the Internal Revenue Service's letter ruling indexing system as would enable

of unsupervised probation, and each fined \$10,000. Respondent Fruehauf Corporation was also fined \$10,000. Respondents have appealed their convictions to the court of appeals (C.A. 6, No. 76-2313).

respondents to determine whether additional similar letter rulings have been issued by the Service.

The Internal Revenue Service moved for summary judgment on the ground that the requested documents were exempt from disclosure under exemption 3 of the FOI Act, 5 U.S.C. 552(b)(3), as "matters that are \* \* \* specifically exempted from disclosure by statute." In support of this motion, the Service relied upon Section 6103 of the Internal Revenue Code of 1954, which then provided that tax returns shall be open to public examination only to the extent authorized in rules and regulations promulgated by the President (A. 33).

2. The district court rejected the claim that the materials were specifically exempt from disclosure by statute. In its view, Section 6103 of the Internal Revenue Code was inapplicable to the documents at issue relating to excise tax returns because "[it] provides for the protection of the privacy of persons filing *Income Tax Returns*" (Pet. App. A 5A; emphasis in original). The district court thereafter entered an order denying the Internal Revenue Service's motion for summary judgment and enjoining it from withholding the records requested by respondents (Pet. App. A 7A-12A). The court ordered that the Service make available the records and documents "intact and without deletion, except for those items which \* \* \* [it] submits to the Court \* \* \* sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the

Court \* \* \* as to whether the proposed deletions are justified under the Freedom of Information Act \* \* \* (Pet. App. A 8A).

The court of appeals affirmed (Pet. App. B 13A-28A). Although it concluded that the district court erred in construing Section 6103 to bar public inspection of only income tax returns, it held that disclosure of the letter rulings was appropriate because they were not "returns" within the meaning of Section 6103 and therefore did not come within exemption 3 of the FOI Act. While the court acknowledged that certain letter rulings might fall within the definition of "return" under the Presidential regulations promulgated under Section 6103, it concluded, in conformity with *Tax Analysts & Advocates v. Internal Revenue Service*, 505 F.2d 350 (C.A.D.C.), that those Regulations could not "immunize letter rulings from disclosure under the Freedom of Information Act, beyond that which Congress intended to protect under § 6103. 505 F.2d at 354, n. 1" (Pet. App. B 20A).

In deciding that the technical advice memoranda sought by respondents did not come within exemption 3, the court of appeals declined to follow the contrary conclusion reached in *Tax Analysts & Advocates*, *supra*, 505 F.2d at 355. It considered the scope of the district court's disclosure order with respect to such documents to be more limited than the order in the *Tax Analysts* case. Finally, the court of appeals also observed that the retained power of the district court to make *in camera* deletions from the



technical advice memoranda would be sufficient to satisfy the prohibitions against disclosure of Section 6103 (Pet. App. B 20A-22A).

By order dated October 9, 1975, Mr. Justice Stewart stayed the judgment of the district court until final disposition of the case in this Court, in the event the government sought certiorari (423 U.S. 919). On January 12, 1976, the Court granted the government's petition for a writ of certiorari (423 U.S. 1047).

3. Since the Court's grant of certiorari and the filing of briefs in this case, the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, was enacted into law on October 4, 1976. The new legislation radically changes the operative rules for the public inspection of the types of Internal Revenue Service documents that are the subject of respondents' FOI Act suit.

Section 1201(a) of that Act, 90 Stat. 1660, adds a new Section 6110 to the Internal Revenue Code of 1954, Appendix, *infra*, pp. 3a-8a. Section 6110(a) permits public inspection of "written determinations" and associated "background file documents." Section 6110(b)(1) defines a "written determination" as "a ruling, determination letter, or technical advice memorandum" issued by the Internal Revenue Service. Section 6110(b)(2) defines the term "background file document" with respect to a written determination to include "the request for that written determination [and] any written material submitted in support of the request, and any communication

(written or otherwise) between the Internal Revenue Service and persons outside the Internal Revenue Service in connection with such written determination \* \* \* received before issuance of the written determination." Moreover, Section 6110(c)(1) exempts from disclosure the names, addresses, and other identifying details of the taxpayers who are subjects of Internal Revenue Service written determinations and background file documents.

In prescribing procedures for disclosure of written determinations, the Act distinguishes between written determinations issued pursuant to taxpayer requests made before and after October 31, 1976. While written determinations issued pursuant to a taxpayer request made after that date will be subject to disclosure within a prescribed period of time, disclosure of written determinations issued pursuant to taxpayer requests made on or before that date is contingent upon a subsequent appropriation of funds to the Internal Revenue Service. See Section 6110(g) and (h)(1), Appendix, *infra*, pp. 5a-8a. However, Section 1201(b) of the Tax Reform Act, 90 Stat. 1667, provides that the appropriation of funds contingency is inapplicable to FOI Act suits, such as the instant case, that were commenced before January 1, 1976. Instead, written determinations sought in such suits "shall be available to the complainant along with the background file document, if requested, as soon as practicable after July 1, 1976." See Appendix, *infra*, p. 8a.

Finally, Section 1202 of the Tax Reform Act of 1976, 90 Stat. 1667, amends Section 6103 of the Code, relating to publication of tax returns and disclosure of information concerning persons filing tax returns. Although Section 6103(a) provides that "Returns and return information shall be confidential," Section 6103(b)(2)(B) excludes from the definition of "return information" those parts of written determinations and background file documents that are subject to public inspection under Section 6110.

4. In light of the new legislation described above, the Internal Revenue Service can no longer argue that all of the documents sought by respondents are "matters that are \* \* \* specifically exempted from disclosure by statute" under exemption 3 of the FOI Act. The letter rulings and technical advice memoranda at issue in this suit are "written determinations" within the meaning of Section 6110(b)(1) of the Code. Some of the second and third categories of documents sought by respondents—the Internal Revenue Service files applicable to 23 published revenue rulings, and the communications received by the Internal Revenue Service from persons outside the executive branch with respect to the requested private letter rulings—are "background file documents" as defined by Section 6110(b)(2). However, it does not appear that any part of the Internal Revenue Service's letter ruling indexing system is either a "written determination" or a "background file document" that would be subject to disclosure.

Since the enactment of the Tax Reform Act of 1976, counsel for the parties have held several meetings and exchanged correspondence in an effort to settle this suit. The Internal Revenue Service has acknowledged its statutory obligation to deliver to respondents copies of the letter rulings and technical advice memoranda, and communications between the Internal Revenue Service and persons outside the executive branch with respect to the requested letter rulings, with appropriate deletions of taxpayer identifying material. Internal Revenue Service personnel are now editing approximately 2,500 written determinations and 7,500 background file documents. It is expected that respondents will begin to receive them within six weeks, after appropriate notice to the affected taxpayers in the Federal Register.

However, the parties have not reached agreement about the Internal Revenue Service files covering 23 published revenue rulings and the Internal Revenue Service's letter rulings indexing system. To the extent that the Service's files contain internal memoranda prepared as part of its deliberative process in connection with the publication of revenue rulings, those documents appear to be intra-agency memoranda protected from disclosure by exemption 5 of the FOI Act, 5 U.S.C. 552(b)(5). Moreover, much of the material in the indexing systems arranged by the name of the taxpayer appears to be taxpayer identifying material that would have to be deleted before disclosure.



With respect to the subject matter indexing systems, the legislative history of the Tax Reform Act demonstrates that Congress anticipated that a new subject matter index would be issued by the Internal Revenue Service covering disclosed written determinations. However, the pertinent Committee Report stated that "it is not contemplated that existing IRS indices will be disclosed." S. Rep. No. 94-938, 94th Cong., 2d Sess. 306 (1976).

While respondents have advised us that they do not seek disclosure of all of the index cards, they have expressed the view that the legislative history of the Tax Reform Act of 1976 requires implementation of the district court's order (Pet. App. A 7A-12A) that the Internal Revenue Service turn over all of the documents encompassed in respondents' request. But the colloquies in the floor debates upon which respondents rely simply support the view that Congress intended that the liberalized disclosure rules of the Tax Reform Act would not foreclose any broader relief that a plaintiff might obtain in an FOI Act suit under the old law. It does not mean that the non-final order in this case cannot be modified to conform to the substantive changes effected by the Tax Reform Act of 1976. See 122 Cong. Rec. S16023 (remarks of Senators Long and Hansen) and H10235-H10236 (remarks of Representative Duncan) (daily ed., September 16, 1976).

At all events, to the extent that there is a remaining controversy between the parties, it is beyond dispute that the new legislation has substantially re-

solved the major public question of the disclosure of Internal Revenue Service letter rulings with respect to which this Court granted certiorari. There is accordingly no need for the Court to hear oral argument and to decide in the first instance the subsidiary questions in this case involving the revenue ruling files and indexing systems.

In these circumstances, the appropriate course would be for the Court to vacate the judgment of the court of appeals and remand the case to that court for consideration of whatever issues may remain unresolved in the light of the Tax Reform Act of 1976. *United States v. New Jersey State Lottery Comm'n*, 420 U.S. 371; *Bryan v. Austin*, 354 U.S. 933.

Respectfully submitted.

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JANUARY 1977.



## APPENDIX

Internal Revenue Code of 1954, as amended by the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520 *et seq.* (26 U.S.C.):

SEC. 6103. CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION.

(a) *General Rule.*—Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii) or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term “officer or employee” includes a former officer or employee.

(b) *Definitions.*—For purposes of this section—

(1) *Return.*—The term “return” means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions

of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) *Return information.*—The term “return information” means—

(A) a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer’s return was, is being, or will be examined or subject to other investigation or processing, or any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

\* \* \* \* \*

## SEC. 6110. PUBLIC INSPECTION OF WRITTEN DETERMINATIONS.

(a) *General Rule.*—Except as otherwise provided in this section, the text of any written determination and any background filed document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.

(b) *Definitions.*—For purposes of this section—

(1) *Written determination.*—The term “written determination” means a ruling, determination letter, or technical advice memorandum.

(2) *Background file document.*—The term “background file document” with respect to a written determination includes the request for that written determination, any written material submitted in support of the request, and any communication (written or otherwise) between the Internal Revenue Service and persons outside the Internal Revenue Service in connection with such written determination (other than any communication between the Department of Justice and the Internal Revenue Service relating to a pending civil or criminal case or investigation) received before issuance of the written determination.

(3) *Reference and general written determinations.*—

(A) *Reference written determination.*—The term “reference written determination” means any written deter-

mination which has been determined by the Secretary to have significant reference value.

(B) *General written determination.*—The term “general written determination” means any written determination other than a reference written determination.

(c) *Exemptions From Disclosure.*—Before making any written determination or background file document open or available to public inspection under subsection (a), the Secretary shall delete—

(1) the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person, other than a person with respect to whom a notation is made under subsection (d)(1), identified in the written determination or any background file document;

(2) information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and which is in fact properly classified pursuant to such Executive order;

(3) information specifically exempted from disclosure by any statute (other than this title) which is applicable to the Internal Revenue Service;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(6) information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for use of an agency responsible for the regulation or supervision of financial institutions; and

(7) geological and geophysical information and data, including maps, concerning wells.

The Secretary shall determine the appropriate extent of such deletions and, except in the case of intentional or willful disregard of this subsection, shall not be required to make such deletions (nor be liable for failure to make deletions) unless the Secretary has agreed to such deletions or has been ordered by a court (in a proceeding under subsection (f)(3)) to make such deletions.

\* \* \* \* \*

(g) *TIME FOR DISCLOSURE.*—

(1) *IN GENERAL.*—Except as otherwise provided in this section, the text of any written determination or any background file document (as modified under subsection (c)) shall be open or available to public inspection—

(A) no earlier than 75 days, and no later than 90 days, after the notice provided in subsection (f)(1) is mailed, or, if later,

(B) within 30 days after the date on which a court decision under subsection (f)(3) becomes final.



(2) **POSTPONEMENT BY ORDER OF COURT.**—The court may extend the period referred to in paragraph (1)(B) for such time as the court finds necessary to allow the Secretary to comply with its decision.

(3) **POSTPONEMENT OF DISCLOSURE FOR UP TO 90 DAYS.**—At the written request of the person by whom or on whose behalf the request for the written determination was made, the period referred to in paragraph (1)(A) shall be extended (for not to exceed an additional 90 days) until the day which is 15 days after the date of the Secretary's determination that the transaction set forth in the written determination has been completed.

(4) **ADDITIONAL 180 DAYS.**—If—

(A) the transaction set forth in the written determination is not completed during the period set forth in paragraph (3), and

(B) the person by whom or on whose behalf the request for the written determination was made establishes to the satisfaction of the Secretary that good cause exists for additional delay in opening the written determination to public inspection,

the period referred to in paragraph (3) shall be further extended (for not to exceed an additional 180 days) until the day which is 15 days after the date of the Secretary's determination that the transaction set forth in the written determination has been completed.

(5) **SPECIAL RULES FOR CERTAIN WRITTEN DETERMINATIONS, ETC.**—Notwithstanding the provisions of paragraph (1), the Secretary shall not be required to make available to the public—

(A) any technical advice memorandum and any related background file document involving any matter which is the subject of a civil fraud or criminal investigation or jeopardy or termination assessment until after any action relating to such investigation or assessment is completed, or

(B) any general written determination and any related background file document that relates solely to approval of the Secretary of any adoption or change of—

(i) the funding method or plan year of a plan under section 412,

(ii) a taxpayer's annual accounting period under section 442,

(iii) a taxpayer's method of accounting under section 446(e), or

(iv) a partnership's or partner's taxable year under section 706,

but the Secretary shall make any such written determination and related background file document available upon the written request of any person after the date on which (except for this subparagraph) such determination would be open to public inspection.

(h) *Disclosure of Prior Written Determinations and Related Background File Documents*—

(1) *In general.*—Except as otherwise provided in this subsection, a written determination issued pursuant to a request made before November 1, 1976, and any background file document relating to such written determination shall be open or avail-

able to public inspection in accordance with this section.

(2) *Time for disclosure.*—In the case of any written determination or background file document which is to be made open or available to public inspection under paragraph (1)—

(A) subsection (g) shall not apply, but

(B) such written determination or background file document shall be made open or available to public inspection at the earliest practicable date after funds for that purpose have been appropriated and made available to the Internal Revenue Service.

. . . . .

Tax Reform Act of 1976, Pub. L. 94-455, Section 1201(b), 90 Stat. 1667:

*Effect Upon Pending Requests.*—Any written determination or background file document which is the subject of a judicial proceeding pursuant to section 552 of title 5, United States Code, commenced before January 1, 1976, shall not be treated as a written determination subject to subsection (h)(1), but shall be available to the complainant along with the background file document, if requested, as soon as practicable after July 1, 1976.

FEB 3 1977

MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

—♦—  
No. 75-679  
—♦—

INTERNAL REVENUE SERVICE,  
Petitioner,

v.

FREUHAUF CORPORATION, et al.,  
Respondents.

—♦—  
RESPONSE TO MOTION TO VACATE AND  
REMAND TO THE COURT OF APPEALS  
—♦—

MOTION TO DISMISS WRIT OF  
CERTIORARI AND TO REMOVE STAY  
—♦—

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# IN THE Supreme Court of the United States

OCTOBER TERM, 1976

—◆—  
No. 75-679

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INTERNAL REVENUE SERVICE,  
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v.

FREUHAUF CORPORATION, et al.,  
Respondents.

—◆—  
RESPONSE TO MOTION TO VACATE AND  
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—◆—  
MOTION TO DISMISS WRIT OF  
CERTIORARI AND TO REMOVE STAY

—◆—  
Respondents urge the Court to deny petitioner's motion to vacate the judgment of the court of appeals and move to dismiss the writ of certiorari and to remove the stay of the judgment of the district court.

1. At the time this action was commenced, respondents were defendants in an excise tax criminal prosecution in the United States District Court for the Eastern District of Michigan.

On October 11, 1972, respondents, as defendants in said criminal action, in order to obtain information vital to their defense, filed a motion for discovery and inspection and a motion for discovery of exculpatory information.

In his memorandum and orders, dated June 21, 1973, the Honorable Thomas P. Thornton, United States District Judge, presiding, wrote as follows:

"In the Defendants' Motion for Disclosure of Exculpatory Information the Defendants have made a request similar to that contained in paragraph 6 of their Motion for Discovery and Inspection. *In its response the Government concedes that* under Sec. 552(a) (3) of the 5 USC (The Freedom of Information Act) the Internal Revenue Service records (except privileged or confidential trade secrets and commercial or financial information obtained from a taxpayer) are available to any person under proper request for identifiable records, and refers Defendants to 26 CFR, Sec. 601.702(c)." (Emphasis added).

Following procedures set out in the Freedom of Information Act, hereinafter referred to as the FOIA, 5 U.S.C. §552, respondents on June 26, 1973, submitted written requests to the Internal Revenue Service for certain excise tax private letter rulings, technical advice memoranda, underlying correspondence and files and index cards for the period from January 1, 1947 to

September 13, 1973, pertaining to specific excise tax information under Section 4216 of the Internal Revenue Code. Final appeal was denied *in toto* by the Commissioner of Internal Revenue on August 22, 1973, citing exemptions 3, 4, 5 and 7 of the FOIA, 5 U.S.C. 552(b). On September 14, 1973, the present action was filed. (Res. App. 8).

The respondents immediately moved for a preliminary injunction against petitioner. (Res. App. 25). The petitioner in turn, moved for a summary judgment claiming that all the requested documents were exempt from disclosure under Exemption 3 of the FOIA, 5 U.S.C. §552(b) (3), as "matters that are specifically exempted from disclosure by statute." (Res. App. 33). In substance, petitioner argued that Sections 6103 and 7213 of the Internal Revenue Code of 1954, which, by their express language apply to returns and income returns respectively, exempt "All documents relating to the enforcement of the Federal Revenue Laws against specific taxpayers." (Emphasis added)

The district court heard arguments on petitioner's motion for summary judgment and subsequently a trial ensued. At the trial the petitioner called only one witness and presented no evidence in support of its contention that any or all of the documents requested were returns, or part of returns within the meaning of Section 6103. Petitioner also presented legal arguments concerning exemptions 4, 5 and 7; however, no evidence was presented by petitioner to support these contentions.

2. On January 11, 1974, the district court denied the petitioner's motion for summary judgment and ruled that



respondents were entitled to disclosure of all of the documents requested stating:

"We consider that *none of the nine exceptions has application* to the material here sought by plaintiffs and that 26 U.S.C.A. §6103 provides for the protection of the privacy of persons filing Income Tax returns. To the extent that any of the material sought by plaintiffs might constitute an invasion of the privacy of taxpayers, there are means that may be employed to avoid such disclosure. *In furnishing plaintiffs the information relative to their defense there need be no violation of Section 6103 of Title 26 of the Internal Revenue Code.*" 369 F. Supp. at p. 110. (Emphasis added). (Res. App. 47, 50).

On appeal, petitioner abandoned its reliance on exemptions 4, 5 and 7 and relied only on Exemption 3 of the FOIA. Petitioner continued to argue in the court of appeals that Sections 6103 and 7213 immunized all documents associated with the administration of the tax laws. The court of appeals rejected this argument, holding that it was the intent of Congress that issues of construction of the FOIA be resolved in favor of public disclosure. (Res. App. 78). The court of appeals properly recognized that the Act places the burden on the petitioner to show that nondisclosure is permitted under one of the nine specifically enumerated exemptions and that the petitioner had not met this burden. The court stated that letter rulings and technical advice memoranda were not "returns" within the meaning of Section 6103 stating it was in agreement with the rationale of the court of appeals for the district of columbia in *Tax Analysts and Advocates v. I.R.S.*, 505 F.2d 350 (D.C. Cir., 1974).

The court of appeals further held that *none of the exemptions in the FOIA* is applicable to the extent that it bar disclosure of the requested documents as a class or group. (Res. App. 78, 85) To the extent that any particular document might contain exempt information they would be subject to *in camera* inspection and deletion by the district court.

By order dated October 9, 1975, Mr. Justice Stewart stayed the judgment of the district court until final disposition of the case in this Court, in the event the government sought certiorari (423 U.S. 919). (Res. App. 101). On January 12, 1976, the Court granted the government's petition for a writ of certiorari (423 U.S. 1047).

3. The judgment of the court of appeals should be affirmed and the appeal dismissed since there would be nothing for the court of appeals to consider should this case be remanded.

It should be noted that the respondents first requested the documents involved on October 11, 1972. It is now January 1977. Throughout all of the court proceedings counsel for the government has continually attempted to harass the respondents by waiting until the last minute to file documents and briefs, seeking and obtaining extensions of time within which to file briefs and delaying oral argument. Now, petitioner again attempts further delay in a decision of the case by asking that it be remanded to the court of appeals, although the FOIA dictates speedy and preferential disposition of pending actions. 5 U.S.C. 552(a) (4) (d).

For example, on March 28, 1974, petitioner stipulated that it would continue to prepare, compile and accumulate all of the information requested at respondents' expense. (Res. App. 74, 75). Yet in its latest motion petitioner pleads that it needs an additional six (6) weeks to compile the information. (Mot. 9) Petitioner recognizes that its only substantial legal argument (Exemption 3) has vanished with the enactment of Sec. 6110. In effect, petitioner now seeks to reargue its appeal before the court of appeals hoping that a miracle will somehow occur to save its case. All attempts to assert that Exemption 5 of the FOIA should apply fail when it was not argued in the court of appeals. Respondents submit that not having argued Exemption 5 of the FOIA in the court of appeals, petitioner should not be permitted to raise it at this late hour. *Mc Grath v. Manufacturers Trust Co.*, 388 U.S. 241 (1949), *Dunn v. United States*, 284 U.S. 390 (1932). Moreover, in spite of the fact that petitioner did not brief this issue before the court of appeals it was considered and rejected by the court when it stated:

"... we agree that probably none of the exemptions is applicable to the extent at least it bars disclosure of the requested documents as a class or group." (Res. App. 78, 85).

Respondents further submit that the district court in its order anticipated that there would be deletions and provided for *in camera* inspection by the court as to whether the proposed deletions are justified under the FOIA. (Pet. App. 8A). Furthermore, Exemption 5 cannot be interposed by petitioner as a blanket shield to disclosure of all of the files underlying the 23 published revenue rulings. This exemption only applies to materials

reflecting the deliberative or policy making process and not to purely factual matters. *N.L.R.B. v. Sears Roebuck & Company*, 421 U.S. 132 (1974), *Washington Research Project, Inc. v. Department of Health, Education and Welfare*, 504 F.2d 238 (D.C. Cir., 1974).

Section 6110 of the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520 and its underlying legislative history establish that Congress did not intend that the new act in any way adversely affect pending FOIA suits such as the present case.

In the Senate debate on September 16, 1976, immediately prior to the enactment of the Tax Reform Act, the following colloquy took place:

"MR. HANSEN. Mr. President, a question has arisen over the treatment of cases under the new rules governing disclosure of private letter rulings and related materials under section 1201(a) of the bill, which adds section 6110 to the revenue code. I would be grateful if the chairman of the committee could advise me as to whether I am correct, Mr. President, in assuming that under section 1201(b) of the bill, rulings, technical advice memorandums, background files, indexes, and card files which were or are the subject of a judicial proceeding under the Freedom of Information Act are not made subject to these new rules on disclosure? In other words, are cases such as *Fruehauf Corp. against Internal Revenue Service*, Supreme Court docket 75-679, in any way adversely affected by the changes contained in section 1201(a) of the bill by reason of section 1201(b)?

"MR. LONG. [Chairman of the Senate Finance Committee]. Mr. President, in answer to the Senator's question, if the Supreme Court or other Federal court, in a pending freedom of information case, affirms a taxpayer's right to disclosure of private letter rulings, technical advice memorandums, background files, *indexes* and *card files*, or other related communications and correspondence, section 1201(b) assures that section 1201(a) will in no way impede or deter the court ordered disclosure as to all the information sought in the pending cases. Similarly, if a pending freedom of information case is decided against the taxpayer, the taxpayer must look to the new law for its disclosure rights. 122 Cong. Rec. S 16023 (September 16, 1976). (Emphasis added).

Similarly in the House debates it was stated:

MR. DUNCAN of Tennessee. Mr. Speaker, section 1201(a) of the bill creates new rules governing the public inspection of written determinations made by the Internal Revenue Service and related background files. It is being enacted, in part, as a response of the need to avoid "secret lawmaking" by the Internal Revenue Service. Under Section 1201(b), rulings, technical advice memoranda, and background file information which were or are the subject of a judicial proceeding under the Freedom of Information Act are not made subject to these new rules on disclosure. For example, Mr. Speaker, cases such as *Fruehauf Corp.* against Internal Revenue Service, Supreme Court Docket 75-679, if decided in favor of the taxpayer,

is not in any way adversely affected by the changes contained in section 1201(a) of the bill by reason of section 1201(b). Thus, if the Supreme Court or other Federal courts, in a pending Freedom of Information case, affirms a taxpayer's rights to disclosure of private letter rulings, technical advice memoranda, background files, *indexes* and *card files*, or other related communications and correspondence, section 1201 (b) will in no way impede or deter the court ordered disclosure as to all information sought in the pending cases. 122 Cong. Rec. H 10235 — H 10236 (September 16, 1976). (Emphasis added).

Respondents are entitled to all of the material covered by the district court order of January 30, 1974, which was affirmed in its entirety by the court of appeals. (Res. App. 52).

Respondents agree with petitioner (Mot. 8) that under Sec. 6110 they are entitled to the private letter rulings, technical advice memoranda and the files underlying the 23 published rulings.

Petitioner in its motion now appears to take the position that respondents are now not entitled to the IRS letter ruling indexing system because of the new act.

Disclosure of the indices is vital to respondents. It is respondents' contention that the IRS has through the issuance of private letter rulings and technical advice memoranda given favorable tax treatment to certain taxpayers thus resulting in a discriminatory application of the revenue laws in favor of certain taxpayers. The only way to insure that all such rulings can be found is



through the use of the index system. Petitioner in its motion admits that it has already agreed to disclose over 10,000 documents. Without the indices, the search for the discriminatory rulings would amount to the search for the proverbial needle in the haystack. Petitioner has also admitted that many of the requested documents have been destroyed. Thus, in some instances the only way to obtain the desired information is through the use of the indices. Finally, the indices will serve as a cross check to determine if all of the requested documents have been disclosed by the IRS.

Respondents are entitled to the indices. As stated above, the new act was not in any way intended to adversely affect pending FOIA cases. Section 6110 was enacted in response to the flagrant disregard of petitioner to the clear mandate of Congress under the FOIA. Petitioner adopted the position that technical advice memoranda and private letter rulings are returns within the meaning of Section 6103 of the Internal Revenue Code. This was not the intent of Congress.

Section 6110 only covers IRS "written determinations" and "background files." It was not intended as the exclusive statement of the public's right to obtain other information or records from the IRS. The FOIA is still in effect and it still applies to agency records. 5 U.S.C. §552(a) (3). This is what the court of appeals correctly held. While an index card may not be a "written determination" or a "background file", it is certainly not a return or return information as the IRS previously argued. Section 1202 of the Tax Reform Act of 1976, 90 Stat. 1667, amends Section 6103 of the Code, relating to

publication of tax returns and disclosure of information concerning persons filing tax returns as follows:

\* \* \* \*

"(b) DEFINITIONS. — For purposes of this section —

(1) RETURN. — The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) RETURN INFORMATION. — The term "return information" means —

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for

any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110.

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

\* \* \* \* \*

As can be seen from this definition, the terms return and return information are construed much more narrowly than the definition promulgated by petitioner in its 1972 regulation. (T.D. 7162). Both the district court and the court of appeals held the indices to be agency records and not tax returns or otherwise exempt from disclosure under any other exemption of the FOIA. Thus, no exemption exists under either the FOIA or Sec. 6110. As agency records, the indices must be disclosed as required by the FOIA.

Petitioner appears to claim that the legislative history of Sec. 6110 indicates that the existing indices are not to be disclosed. S. Rep. No. 94-938, 94th Cong. 2d Sess. 306 June 10, 1976. Such a position is untenable since petitioner has quoted the Committee's report out of context. The paragraph from which the quote in petitioner's motion is taken provides:

"Under the committee amendment, IRS written determinations, i.e., rulings, technical advice memoranda, and determination letters would

generally be open to public inspection; that is, they would be made available for public inspection and copying in a public reading room in or near the issuing office. A complete set of IRS rulings and technical advice memoranda would be made available in a central public reading room in Washington, D.C. It is intended that a subject-matter index would also be placed in the public reading rooms. This index would classify rulings, etc., on the basis of the Code sections and issues involved. (It is anticipated that, as is presently the case with respect to other aspects of the tax law, various commercial services will make pertinent parts of this material available to people located elsewhere.) However, it is not contemplated that existing IRS indices will be disclosed. The House bill achieved a similar result."

This paragraph establishes that the disclosure provisions of Sec. 6110 are intended to closely parallel Sec. (a) (2) (5 U.S.C. 552(a) (2)) of the FOIA which requires that certain agency materials must be made available to the public for inspection and copying even without a specific request. That is, each agency must in the ordinary course of its day-to-day operation provide some procedure for on-going, *voluntary* disclosure. This is what the Committee is referring to when it discusses making written determinations available in public reading rooms. It was not intended that existing IRS indices would be unavailable under the FOIA and particularly to those FOIA cases pending on January 1, 1976.

Thus, the Committee's statement that "it is not contemplated that existing IRS indices will be disclosed" S. Rep. No. 94-938, 94th Cong., 2d Sess. 306 (1976) merely means that Congress did not contemplate voluntary disclosure of existing indices. However, since these indices are obviously agency records, under Sec. (a) (3) (5 U.S.C. 552(a) (3)) of the FOIA, they must be disclosed under the judgment of the court of appeals.

Petitioner argues, (Mot.10) that the determination of the district court was a "non-final order" which can now be modified. The decision of the district court was a final order. Appeals to the court of appeals may be taken only from a final order. 28 U.S.C. 1291. Such a final order should not now be modified. The decision of this Court should be based on the facts as reported and the law as reported in the statutes at the time.

The colloquy on September 16, 1976, in the Senate and House, set out on pages 7, 8 and 9 herein which occurred subsequent to the Senate report 94-938 of June 30, 1976, clearly states that it remains the intent of Congress that the requested indices be disclosed to respondents as parties commenced litigation prior to January 1, 1976.

The cases of *United States v. New Jersey State Lottery Commission*, 420 U.S. 371; *Bryan v. Austin*, 354 U.S. 933, cited by petitioner (Br. 11), do not apply in this case. In each of the cited cases while statutes were enacted by the States involved requiring remand of the cases for further consideration by the lower courts neither case contained a "grandfather clause" such as that contained in the Tax Reform Act of 1976, Pub. L. 94-455, Section 1201(b), 90 Stat. 1667. Section 1201(b)

specifically exempted judicial proceedings commenced under 5 U.S.C. 552 prior to January 1, 1976. In addition, in the *New Jersey* case 18 U.S.C. Sec. 1307(a) (2) was enacted subsequent to the appeal making Section 1304 inapplicable to the case. In *Bryan*, the State after Certiorari was granted repealed a law requiring written disclosure of a teacher's affiliation with the NAACP. The judgment of the district court was vacated and the case remanded with leave to the appellants to amend their pleadings. In the instant case Congress enacted Section 6110 of the Internal Revenue Code to broaden the rights of taxpayers and clarify the law. In doing so it very pointedly did not repeal, amend or modify in any way 5 U.S.C. Sec. 552 (the FOIA).

Respondents agree with petitioner (Mot. 10, 11) that it is beyond dispute that the new legislation has substantially resolved the major public question of the disclosure of the Internal Revenue Service excise tax letter rulings and technical advice memoranda with respect to which this court granted certiorari. The major issues having been decided in favor of respondents, the court should dismiss the appeal and permit the decisions of the district court and the court of appeals to stand. The question could well be asked "Would this court have granted certiorari if the only issues on appeal were 'the Internal Revenue Service files covering 23 published letter rulings and the Internal Revenue Services' letter rulings indexing system?' " Respondents think not!



The stalling and foot-dragging tactics of the petitioner cannot be allowed to continue. The only effect which the new legislation has on this case is to conform respondents' rights to all of the material covered by the judgments of the lower court.

In view of all of the above considerations it is respectfully submitted that Petitioner's motion should be denied and that the Writ of Certiorari be dismissed and the stay of the district court's order be removed.

Respectfully submitted,

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No. 75-679

Supreme Court, U. S.  
**FILED**  
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MICHAEL RUDAK, JR., CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

INTERNAL REVENUE SERVICE, PETITIONER

v.

FRUEHAUF CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**REPLY MEMORANDUM FOR THE PETITIONER IN  
SUPPORT OF MOTION TO VACATE AND REMAND**

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**REPLY MEMORANDUM FOR THE PETITIONER IN  
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1. Respondents' opposition to our motion to vacate and remand this case to the court of appeals for consideration of whatever issues may remain unresolved in the light of the Tax Reform Act of 1976 ignores "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711. As the Court there pointed out, the rule originates in *United States v. Schooner Peggy*, 1 Cranch 103, 110, where Chief Justice Marshall stated: "But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."



The principle of *Schooner Peggy* is fully applicable to this case. Since the Court's grant of certiorari, the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, was enacted into law on October 4, 1976. Section 1201(b) of the Act (Motion to Vacate, App. 8a) provides that the new statute is effective with respect to pending Freedom of Information Act litigation. Thus, it is the new statute, and not the judgment of the court of appeals, that provides the operative rules for the disposition of this case. There is accordingly no basis to respondents' motion to dismiss the writ of certiorari outright and thereby leave the judgment of the court of appeals undisturbed. That judgment must now yield to the provisions of the Tax Reform Act.

2. Contrary to respondents' assertion (pp. 7-9), the statements in the floor debates at the time of the passage of the Tax Reform Act do not support their claim that Congress intended that the new statute would not modify the judgment below in this case. As we have pointed out in our motion to vacate and remand (p. 7), Section 1201(a) of the Tax Reform Act provides for public inspection of Internal Revenue Service "written determinations" and "background file documents." The statute establishes a cut-off date as of October 31, 1976, and distinguishes between taxpayer requests for written determinations made on or before and after that date. Disclosure of written determinations requested on or before that date is contingent upon a subsequent appropriation of funds to the Internal Revenue Service. See Section 6110(g) and (h)(1) and (2) (Motion to Vacate, App. 5a-8a). However, Section 1201(b) of the Tax Reform Act provides that the appropriation-of-funds contingency of Section 1201(a) is inapplicable to FOI Act suits, such as this case, that were commenced before January 1, 1976.

The statement of Senator Long cited by respondents (p. 8) simply affirms that disclosure in such cases

is not to await the appropriation of funds. As Senator Long noted, " \* \* \* section 1201(b) assures that section 1201(a) will in no way impede or deter the court ordered disclosure as to all the information sought in the pending cases." See 122 Cong. Rec. S16023 (daily ed., September 16, 1976). Similarly, Representative Duncan observed that FOI Act suits commenced before January 1, 1976, would not "in any way [be] adversely affected by the changes contained in section 1201(a) of the bill by reason of section 1201(b)." See 122 Cong. Rec. H10236 (daily ed., September 16, 1976). It is therefore plain that Congress did not intend to insulate the judgment of the court of appeals in this case from the effect of the substantive rules of the new Act.

Moreover, the language of Section 1201(b) itself refutes respondents' claim (p. 16) that the only effect of the new Act upon this case is to confirm their right "to all of the material covered by the judgments of the lower court." That provision speaks of "[a]ny written determination or background file document." But the definitions of "written determination" and "background file document" set forth in the new Code Section 6110 (b) (Motion to Vacate, App. 3a) do not encompass much of the revenue ruling files or any part of the letter ruling indexing systems sought by respondents. Accordingly, nothing in the language or the legislative history of Section 1201(b) of the Tax Reform Act supports disclosure of all of the documents sought by respondents in this case.

3. Finally, respondents contend that the writ of certiorari should be dismissed because (p. 5) "there would be nothing for the court of appeals to consider should this case be remanded." But there is a disagreement between the parties whether the Tax Reform Act requires disclosure of all of the revenue ruling files and the letter ruling indexing systems sought by respondents. Those questions should be addressed by the court of appeals in the first instance.

Although respondents acknowledge (p. 10) that an indexing system is not a "written determination" or a "background file," they contend that it is not a "return" or "return information," both of which the newly amended Section 6103(a) of the Internal Revenue Code (Motion to Vacate, App. 1a) requires to be kept confidential. In respondents' view, these documents are "agency records" under the FOI Act (5 U.S.C. 552(a)(3)).

However, the remaining issues in this case cannot be resolved by simply characterizing the documents sought by respondents as "agency records" under the FOI Act without regard to whether they are exempt from disclosure. Section 6103(b)(1) (Motion to Vacate, App. 1a-2a) defines the term "return" to include "any tax or information return \* \* \* required by \* \* \* the provisions of this title which is filed with the Secretary \* \* \*." Moreover, Section 6103(b)(2) defines "return information" to include—

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of \* \* \* liability \* \* \* of any person under this title for any tax \* \* \* or other imposition \* \* \*.

In light of this broad statutory definition of "return information," which became effective on January 1, 1977,<sup>1</sup> we believe that much of the revenue ruling files

<sup>1</sup>See Section 1202(i) of the Tax Reform Act, Pub. L. 94-455, 90 Stat. 1688. The pertinent legislative history (S. Rep. No. 94-938, 94th Cong., 2d Sess. 318 (1976)) states that the new definitions of "return" and "return information" supersede their statutory predecessor and the Treasury Regulations approved by the President that were formerly at issue in this case (see Pet. App. E 32A).

and all of the letter ruling indexing systems will continue to be protected from disclosure under Exemption 3 of the FOI Act— as "matters that are \* \* \* specifically exempted from disclosure by statute." Since respondents dispute this construction of the Tax Reform Act, the appropriate course is to remand the case to the court of appeals for initial resolution of the question whether the revenue ruling files and the letter ruling indexing systems contain "return information" within the meaning of the newly amended Section 6103 (b)(2) of the Code.<sup>2</sup>

<sup>2</sup>While respondents contend (p. 6) that the government "now seeks to reargue its appeal before the court of appeals," the remand proceeding before that court will not involve reconsideration of previously decided issues. To the contrary, the question before the court of appeals on remand will be the effect of the new provisions of the Tax Reform Act with respect to the revenue ruling files and letter ruling indexing systems.

Respondents further argue (p. 6) that the court of appeals has foreclosed the government from raising other exemptions under the FOI Act. But that is not the case. The court of appeals stated that it agreed with the district court that "probably none of the exceptions is applicable to the extent at least that it bars disclosure of the requested documents as a class or group" (Pet. App. B 21A). However, it went on to state (*ibid.*) that it did "not read [the district court's opinion] as meaning \* \* \* that a given specific document which is finally delivered over for *in camera* inspection may not contain material which is excludable as within one of the exempted categories."

For the reasons stated above and in our motion to vacate and remand, the judgment of the court of appeals should be vacated and the case remanded to that court for further consideration of whatever issues may remain unresolved in light of the Tax Reform Act of 1976.

Respectfully submitted.

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